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After the Revolution: Natural Law and the Antislavery Constitutional Tradition

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After the Revolution: Natural Law and the Antislavery Constitutional Tradition

by

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After the Revolution: Natural Law and the Antislavery Constitutional Tradition

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Public actors associated with the tradition of American antislavery constitutionalism in the nineteenth-century insisted that the Constitution of 1787 contained certain inbuilt purposes or animating principles, which ought to have aided constitutional interpreters in construing specific provisions of the constitutional text that related, directly or indirectly, to the law and politics of slavery in the United States. The Constitution of 1787 recognized the existence of slavery in the several states, yet antislavery constitutionalists interpreted even the slavery-related clauses as aspiring toward a certain liberal constitutional vision that was not yet a reality. In this dissertation, I argue, first, that these nineteenth-century interpretations of the Constitution in antislavery terms were intricately bound up with theories of natural law, and, second, I suggest that this aspect of the antislavery constitutional tradition offers a strong interpretive challenge (both descriptive and normative) to various aspects of the current scholarly literature on constitutional development and constitutional theory.

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Chapter 1: The Apple of Gold and the Frame of Silver

In his published notes on the debates at the Constitutional Convention, James Madison affirmed that "the real difference of interest" between states "lay, not between large & small but between N. & Southn. . . . The institution of slavery & its consequences," Madison observed, "formed the line of discrimination."[1] In certain crucial respects, the Constitution written in Philadelphia during the summer of 1787 was, therefore, the product of "a mediation of sectional interests that were based chiefly on slavery."[2] But the spirit of compromise, which allowed such a mediation of interests to take place, also led, as Gouverneur Morris protested, to a certain "incoherence." If these moral and political differences "be real," the Pennsylvania delegate had declared during debate on the principle of representation, then "let us at once take a friendly leave of each other" rather than "attempting to blend incompatible things."[3]

In the end, however, the convention delegates did seem to blend the incompatible. Slaves were to be represented as property but also as men. The congressional commerce power would allow a national tax or prohibition on the importation of slaves from foreign shores but only after twenty years. The return of fugitive slaves was constitutionally guaranteed but it was unclear whether this was a matter of interstate comity or an obligation for the national government to enforce. Deeper moral and political principles, too, seemed to exist in an uneasy tension with the provisions dealing with slavery. Madison voiced his own concern during debates at the convention that it would be

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[1] Max Farrand, ed., *Records of the Federal Convention of 1787*, 3 vols. (New Haven, CT: Yale University Press, 1911), 2:10 (July 14).

[2] William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* (Ithaca, NY: Cornell University Press, 1977), 64.

[3] Farrand, ed., *Records*, 1:604 (July 13).

"wrong to admit in the Constitution the idea that there could be property in men,"[4] and the constitutional text spoke of slavery only indirectly with euphemisms and circumlocutions, ostensibly to placate the middle and northern states, whose delegates had "particular scruples" with the word "slavery" appearing in the country's fundamental law.[5]

In later contests over the constitutional status of slavery, the competing principles behind many of the Constitution's compromises afforded plausible arguments for both proslavery and antislavery interpretations. Some insisted that slavery was the "very bond of [the] union,"[6] which could not be removed without destroying the entire constitutional structure, while others described the clauses in the Constitution dealing with slavery as mere "scaffolding" necessary for the construction of an otherwise "glorious liberty document."[7] The ambiguity in the relationship between slavery and the Constitution, engendered by the delegates' attempt to blend incompatible principles, left the door open to such variant interpretations, and these competing interpretations often rested on principles that were not explicit in the constitutional text.

In this dissertation, I trace the development in America of a tradition of antislavery constitutional theorizing, which insisted that the foundational principles of the Constitution were antithetical to chattel slavery even while acknowledging the ways in which slavery had been protected by the Constitution's various compromises. As I argue,

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[4] Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 5 vols. (New Haven: Yale University Press, 1911) 5:478 (August 25).

[5] Elliot, *Debates*, 4:176 (James Iredell in the North Carolina ratifying convention). See also, Wiecek, *The Sources of Antislavery Constitutionalism*, 76.

[6] *The Antelope* (1825) 23 U.S. 66 at 86 (Georgia Senator John Berrien).

[7] Frederick Douglass, "Should the Negro Enlist in the Union Army?" In Foner, Philip S., ed., *Frederick Douglass on Slavery and the Civil War: Selections from his Speeches and Writings* (Mineola, NY: Dover Publications, 2003), 50.

natural law theories provided the theoretical foundation for *constitutional* arguments against slavery and, in this way, natural law theories were central to the development of American antislavery constitutionalism. Considerations of fundamental constitutional commitments, including commitments based on natural law, highlighted the felt tension between law and morality, and, in the common parlance of the day, this tension was described as a disharmony between the "laws of God and man." The influence of this theoretical framework is an important yet marginalized aspect of the development of American antislavery constitutionalism, and a reconsideration of the principles supporting this theoretical framework, in turn, yields certain interpretive challenges (both descriptive and normative) to contemporary constitutional scholarship.

SLAVERY AND THE CONTRADICTIONS OF THE AMERICAN FOUNDING

The tension or disharmony between normative constitutional principles and the institution of slavery was evident at the beginning of America's fledgling republic, as slave-holding colonists appealed to the universal rights of mankind in order protest government policies designed to reduce them to a state of "slavery." What seems obvious to us now—that it was a gross contradiction to hold some men in chains while declaring the right of all men to live free—was equally obvious to many during the founding era. A conflict between the entrenched and economically profitable system of chattel slavery and the widespread influence of the ideas of natural freedom, equality in natural rights, and government by consent made slavery an acute practical and theoretical problem in post-revolutionary America and presented serious difficulties for constitutional framers

after the war. Indeed, this conflict uncovered certain contradictions between the foundational ideas upon which Americans had justified their Revolution and the existential reality of American constitutional politics.

In his account of the proceedings at the Constitutional Convention, the Maryland delegate Luther Martin identified what he saw as the fundamental contradiction embodied in the American Founding. "It was said," Martin recalled,

> . . . that we had but just assumed a place among independent nations, in consequence of our opposition to the attempts of Great-Britain to *enslave us*; that this opposition was grounded upon the *preservation of those rights*, to which God and nature had entitled *us*; not in *particular*, but in *common* with *all the rest of mankind*. That we had *appealed* to the *Supreme being* for his *assistance*, as the *God of freedom*, who could not but *approve* our efforts to preserve the *rights* which he had thus *imparted to his creatures*; that now, when we scarcely had risen from our *knees*, from *supplicating* his *aid* and *protection*—in *forming our government* over a *free people*, a government formed pretendedly on the *principles of liberty* and for *its preservation*,--in *that* government to have a provision, not only putting it *out of its* power to *restrain* and *prevent* the *slave trade*, but *even encouraging that most infamous traffic*, by giving the *States power* and *influence* in the *union*, *in proportion* as they cruelly *and wantonly sport with the rights of their fellow creatures* . . . .[8]

The constitutional document crafted in Philadelphia was, in fact, replete with concessions to the delegates from South Carolina and Georgia, who insisted that there would be no union if their peculiar institution were to be left to the whims of the national legislature. The most obvious of the concessions to the slave interest included a representation scheme that counted each slave as three-fifths of a person (Article 1§2), a guarantee that the African slave-trade would not be federally proscribed for a period of twenty years (Article 1§9), and a provision calling for the inter-state rendition of fugitive slaves (Article 4§2). Several of the seemingly innocuous clauses in the Constitution, as well,

[8] Luther Martin, "Genuine Information" (1788) in Herbert Storing, ed., *The Complete Anti-Federalist*, 7 vols. (Chicago: University of Chicago Press, 1981), 2.4.63-71.

were either designed to bolster the institution of slavery or nonetheless had the practical effect of doing so.[9]

The slavery-related clauses in the Constitution of 1787 were not, however, attributable to a general moral obtuseness among members of the founding generation. The fundamental contradiction between the principles of the American Revolution and the system of black chattel slavery was widely acknowledged even in the late eighteenth-century. "That men should pray and fight for their own Freedom and yet keep others in Slavery," John Jay conceded, "is certainly acting a very inconsistent as well as unjust and perhaps impious part."[10] The esteemed law professor St. George Tucker, as well, later observed that

> Whilst we were offering up vows at the shrine of liberty, and sacrificing hecatombs upon her alters . . . we were imposing upon our fellow men; who differ in complexion from us, a *slavery*, ten thousand times more cruel than the utmost extremity of those grievances and oppressions, of which we complained.[11]

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[9] See, generally, Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson* (Armonk, NY: M.E. Sharpe, 1996). As John Kaminski explains, included among the provisions indirectly affecting slavery were those clauses "(1) authorizing Congress to call forth the militia to help suppress domestic insurrections (including slave uprisings); (2) prohibitions on both the federal and state governments from levying export duties, thereby guaranteeing that the products of a slave economy (tobacco, indigo, rice, etc.) would not be taxed; (3) providing for the indirect election of the president through electors based on representation in Congress, which, because of the three-fifths clause, inflated the influence of the white Southern vote; (4) requiring a three-fourths approval of the states to adopt amendments to the Constitution, thus giving the South a veto power over all potential amendments; and (5) limiting the privileges and immunities clause to 'citizens,' thus denying these protections to slaves and in some cases to free blacks." See John Kaminski, ed., *A Necessary Evil? Slavery and the Debate over the Constitution* (Madison, WI: Madison House, 1995), 45. For a discussion of various scholarly interpretations of the slavery clauses in the Constitution, see also William M. Wiecek, "Slavery in the Making of the Constitution" in *The Sources of Antislavery Constitutionalism in America, 1760-1848* (Ithaca, NY: Cornell University Press, 1977), 62-83 and Michael Zuckert, "Legality and Legitimacy in *Dred Scott*: The Crisis of the Incomplete Constitution," *Chicago-Kent Law Review*, 2007, Vol. 82, pp. 291-299.

[10] John Jay to Richard Price (27 September 1785), MS Columbia University. Reprinted in Philip B. Kurland and Ralph Lerner, eds., *The Founder's Constitution*, 5 vols. (Chicago: University of Chicago Press, 1987), 1:538.

[11] St. George Tucker, "A Dissertation on Slavery" in *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia,* 5 volumes (Philadelphia: 1803). Excerpt reprinted in *The Founder's Constitution*, 1:561-566.

In pamphlets and newspaper articles, speeches and sermons, both before and after the Revolution, slave-holding and non slave-holding Americans declaimed the institution as a national curse and a great moral evil. In his *Summary View of the Rights of British Americans*, Thomas Jefferson considered the "abolition of domestic slavery" to be the "great object of desire" in colonial America, and, in his original draft of the Declaration of Independence, Jefferson included as one of the charges against the English Monarch that

> He has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating & carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither.[12]

The Father of the Constitution, James Madison, denounced chattel slavery as "the most oppressive dominion ever exercised by man over man," while the Father of the Country, George Washington, declared that "there is not a man living who wishes more sincerely than I do, to see a plan adopted for the abolition of it."[13]

Yet few revolutionaries made serious attempts to pluck the moats from their own eyes before they endeavored to remove the beam from the eye of King George. Such inconsistency was certainly useful for Tory critics of the revolution, who chastised the Americans for complaining of their "enslavement" to imperial masters. As Samuel Johnson famously asked during parliamentary debates in Westminster, "how is it we hear

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[12] Thomas Jefferson, "A Summary View of the Rights of British America" (July 1774) in Julian P. Boyd, et al, eds., *The Papers of Thomas Jefferson* (Princeton: Princeton University Press, 1950). Excerpt reprinted in *The Founder's Constitution*, 1:439; Thomas Jefferson, "Notes on Debates in Congress" (2-4 July 1776), *ibid*., 1:523-524.

[13] James Madison (6 June 1787) in Max Farrand, ed., *The Records of the Federal Convention of 1787*, Rev. ed., 4 vols. (New Haven and London: Yale University Press, 1937), 1:135; George Washington to Robert Morris (12 April 1786) in John C. Fitzpatrick, ed., *The Writings of George Washington from the Original Manuscript Sources 1754-1799* (Washington, 1938), Vol. 28, Electronic Text Center, University of Virginia, <www.etext.virginia.edu/washington/fitzpatrick> (Accessed 19 March 2009).

the loudest yelps for liberty among the drivers of negroes?"[14] Indeed, even as Jefferson accused the King of "waging cruel war against human nature," he personally held legal title to some 200 African slaves, many of whom, like the slaves of Madison and Washington, actively sought refuge in the military camps of the British Royal Army during the war. When given the opportunity to construct a new system of government based on reflection and choice, the Founders then drafted a constitution that hedged, in various ways, the institution they had singularly denounced as the nefarious imposition of an oppressive Crown.

In his reflections on the Constitutional Convention, Martin—dubbed America's "drunken prophet" by a recent biographer—observed that the slavery clauses in the proposed Constitution had led some delegates to conclude that the legal instrument was

> . . . a *solemn mockery of*, and *insult to*, *that God* whose protection we had then implored, and could not fail to hold us up in *detestation*, and render us *contemptible* to every *true friend* of liberty in the world. It was said, it ought to be considered that *national* crimes can only be, and *frequently are*, *punished* in this world by *national punishments*, and that the *continuance* of the slave trade, and thus giving it a *national sanction* and *encouragement*, ought to be considered as *justly exposing* us to the *displeasure* and *vengeance of Him*, who is equal Lord of all, and who views with equal eye, the poor *African slave* and his *American master*![15]

This inability or unwillingness of the delegates to the Constitutional Convention to right what was widely recognized to be a great national evil portended, to some participants, a

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[14] Samuel Johnson, "Taxation no Tyranny: An Answer to the Resolutions and Address of the American Congress" (1775) in *The Works of Samuel Johnson* (Troy, NY: Pafraets Book Co., 1903), 14:93-144.

[15] Luther Martin, "Genuine Information" (1788) in Storing, ed., *The Anti-Federalist*, 2.4.63-71. The biography is Bill Kauffman, *Forgotten Founder, Drunken Prophet: The Life of Luther Martin* (Wilmington, DE: ISI Books, 2008).

great national tragedy. "By an inevitable chain of causes and effects," George Mason had warned, "Providence punishes national sins by national calamities."[16]

THE LINCOLNIAN INTERPRETATION

Three score and eighteen years later, during his Second Inaugural Address as President of the United States, Abraham Lincoln employed a similar cosmology as he offered his own tragic interpretation of the American experiment. Slaves had "constituted a peculiar and powerful interest" in antebellum America, Lincoln observed, and "all knew that this interest was somehow the cause of the war."[17] Quoting from Scripture, Lincoln then summarized, in familiar words, his interpretation of the conflict:

> 'Woe unto the world because of offenses; for it must needs be that offenses come, but woe to that man by whom the offense cometh.' If we shall suppose that American slavery is one of those offenses which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove, and that He gives to both North and South this terrible war as the woe due to those by whom the offense came, shall we discern therein any departure from those divine attributes which the believers in a living God always ascribe to Him? Fondly do we hope, fervently do we pray, that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue until all the wealth piled by the bondsman's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said 'the judgments of the Lord are true and righteous altogether.'[18]

Yet although Lincoln viewed slavery as a particular national evil—providentially punishable, even, by a mighty scourge of war—he did not agree with the position

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[16] George Mason (22 August 1787) in Max Farrand, ed., *Records of the Federal Convention*, Vol. II, pg. 370.

[17] Lincoln, "Second Inaugural Address" (4 March 1865) in Roy P. Basler, ed., *The Collected Works of Abraham Lincoln*, 9 vols. (New Brunswick, NJ: Rutgers University Press, 1953), 8:332-333.

[18] *Ibid*.

espoused by anti-federalists such as Luther Martin and George Mason that the Constitution was itself the sanctioner and protector of that national evil.

In the Lincolnian interpretation, well known in our own day, the Constitution drew aspirational content from the principles in the opening lines of the Declaration of Independence. In a reflection on Proverbs 25:11, Lincoln wrote of the proclamation that "all men are created equal" and "endowed by their Creator with certain unalienable rights,"

> The assertion of that principle, at that time, was the word, 'fitly spoken,' which has proved an 'apple of gold' to us. The Union, and the Constitution, are the picture of silver, subsequently framed around it. The picture was made for the apple, not to conceal, or destroy the apple; but to adorn, and preserve it. The picture was made for the apple—not the apple for the picture.[19]

Within the context of slavery, then, the aspirations of the American regime were succinctly stated in the Declaration of Independence, and the Constitution was appropriately understood as incorporating those aspirations or as being framed in order to realize those aspirations. Accordingly, all of the provisions in the Constitution implicitly touching the slavery issue could be seen as anticipating a time when slavery would become extinct. The fact that the word did not grace the pages of the Constitution was evidence, for Lincoln, that a time without slavery was anticipated, for "covert language was used with a purpose, and that purpose was that . . . when it should be read by intelligent and patriotic men, after the institution of slavery had passed from among us—

[19] Lincoln, "Fragment on the Constitution and the Union" (January 1861) in Basler, ed., *The Collected Works of Abraham Lincoln*, 4:168-169.

there should be nothing on the face of the great charter of liberty suggesting that such a thing as negro slavery had ever existed among us."[20]

Additionally, the central place Lincoln gave to the political doctrines in the Declaration of Independence was derived, in part, from his belief that they were grounded in truths that transcended a particular time and place and found an enduring basis in human nature. Nature, for Lincoln, in other words, did not merely denote what *is* but also supplied norms of what *ought* to be, and reason, rather than passion, provided the means by which man apprehended those practical axioms. As such, the particular norms of a particular polity could be measured against transcendent, rational standards. While Lincoln thought that historically the Declaration articulated principles that were relevant to the exercise of constitutional interpretation, the debate over the natural rights doctrine in the Declaration and its application to African slaves was also part of "the eternal struggle between these two principles—right and wrong—throughout the world."[21] Such an interpretation of the Constitution—as the Frame of Silver constructed around an Apple of Gold—in turn allowed Lincoln to interpret America's fundamental law, despite its imperfections, as a "great charter of liberty."[22]

Lincoln's moderate antislavery interpretation of the Constitution (understood in light of the Declaration of Independence and with a view toward the ultimate extinction of slavery) emerged against the backdrop of radical abolitionism, on the one hand, and pro-slavery constitutionalism, on the other. As Lincoln observed in his Second Inaugural, Americans knew that agitation over slavery was "somehow the cause of the war"—but,

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[20] Lincoln, "Seventh and Last Debate with Stephen A. Douglas at Alton, Illinois" (15 October 1858) in Basler, ed., *Collected Works of Abraham Lincoln*, 3:307.
[21] *Ibid*., 3:315.
[22] *Ibid*., 3:307.

while praying to the same God and reading the same Bible, they did not ascribe blame for the contest over slavery to the same source. Americans who took a principled stand against slavery asserted with one accord that the institution was a violation of the natural moral order, but the paramount disagreement that split the antislavery movement into radical and moderate camps concerned whether or not the Constitution was, as Lincoln insisted, an essentially antislavery document. The question that split radical abolitionists and pro-slavery constitutionalists, by contrast, was not whether the Constitution was antislavery—they agreed that it was not—but whether slavery was a moral wrong that contravened the law of nature. For those Americans who insisted that slavery was a social and moral good, the blame for the war could be laid squarely at the feet of the abolitionists and their moderate enablers, such as Lincoln. The nineteenth-century debate over slavery—both within the abolitionist movement and within the polity as a whole—was thus structured, to a large degree, around the meaning and legacy of the natural law tradition in America and the relationship between the principles of natural law and the Constitution.

Because the philosophical viability of natural law theories is generally disparaged in contemporary scholarship, however, the fundamental role that disputes over natural law played in the development of antislavery constitutionalism has not received the attention it deserves. Neither have the implications of the modern philosophical rejection of natural law, within the context of slavery and American constitutionalism, been adequately considered.[23] Yet the general premises undergirding current constitutional

[23] One notable exception is the work of Harry V. Jaffa on the political thought of Abraham Lincoln in *Crisis of the House Divided: An Interpretation of the Issues in the Lincoln-Douglas Debates*, 2nd ed. (Chicago: University of Chicago Press, 1982) and *A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War* (Lanham, MD: Rowman & Littlefield, 2000).

scholarship make it difficult for modern scholars to make normative judgments about competing historical sources, and, in turn, they cannot render the same account of the constitutional wrong of slavery that underlay Lincoln's "Apple of Gold" metaphor.

THE DEATH OF NATURAL LAW CONSTITUTIONALISM

Indeed, Lincoln's constitutional interpretation required the philosophic vitality of those "Jeffersonian axioms," as he called them. But those axioms—grounded foremost in a belief in natural law—have since died in American constitutional theory, receiving their deathblow from a man who endured a nearly fatal wound while fighting at Antietam in defense of the Union. The thrice wounded Civil War veteran and later Associate Justice of the Supreme Court, Oliver Wendell Holmes, declared in his seminal article in the *Harvard Law Review* during the first part of the twentieth-century that those jurists and statesmen who still believed in natural law were "in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere."[24] The grounds of human judgment, Holmes explained, were based on deep-seated preferences, relative to each man. Thus rights and duties were founded on the arbitrary desires, beliefs, and wishes of society rather than on any "*a priori* discernment of a duty or the assertion of a preëxisting right."[25] Though men may be willing to fight each other and even die for their arbitrary preferences, still, from an enlightened vantage point, the other's grounds for fighting "are just as good as ours."[26]

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[24] Oliver Wendell Holmes, "Natural Law," *Harvard Law Review*, Vol. 32, No. 1 (November 1918), 41.
[25] *Ibid*., 42.
[26] *Ibid*., 41.

Once we have accepted that the grounds of judgment are relative, however, what support may be given to Lincoln's constitutionalism? What becomes of the theory of constitutional aspiration? And upon what grounds might we judge the historically competing principles implicit in the constitutional compromises over slavery? The general milieu of modern constitutional theory, in answering these questions, diverges from the Lincolnian view principally on two points. First, the Constitution is understood either to embody equally proslavery and antislavery aspirations or to be dominantly proslavery in orientation. Second, the particular natural rights theory found in the Declaration of Independence is believed to be philosophically discredited. As Gary Jacobsohn noted in *The Supreme Court and the Decline of Constitutional Aspiration*, many of our modern approaches to constitutional interpretation "were developed during a time distinguished by its rejection of eternal principles of natural justice" and therefore "founding aims and principles no longer display a decisive . . . presence in contemporary constitutional theory."[27]

Herbert Storing observed that part of this rejection of founding aims and principles is based on the modern opinion that "admirable as the Founders may be in other respects, in their response to the institution of Negro slavery, their example is one to be lived down rather than lived up to."[28] Noting that both radical abolitionists and proslavery constitutionalists in the antebellum era viewed the Constitution in essentially proslavery terms, Storing went on to write, "one of the best, and surely most authoritative, expressions of this view came in the opinion of Chief Justice Taney in the

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[27] Gary J. Jacobsohn, *The Supreme Court and the Decline of Constitutional Aspiration* (Totowa, NJ: Rowman & Littlefield, 1986), pp. 2, 10.

[28] Herbert Storing, "Slavery and the Moral Foundations of the American Republic," in Robert H. Horwitz, ed., *The Moral Foundations of the American Republic* (Charlottesville: University Press of Virginia, 1977), 214.

famous Supreme Court case of *Dred Scott v. Sandford*."[29] In that famous—and now infamous—opinion, Taney argued that the Framers meant to exclude African slaves from participation in the natural rights spoken of in the Declaration of Independence, that the Constitution strictly and expressly affirmed a right to own and traffic in slaves, and that no one at the time of the Founding would have thought that the descendents of slaves, whether or not they had progressed to a state of freedom, could ever be considered as part of the people for whom the Constitution was written.

The inegalitarian interpretation of the American regime represented in Taney's opinion has, of course, always had adherents, and modern scholarship has begun to dig deeper into America's racist and ascriptive traditions.[30] Rogers Smith, in particular, has provided an account of the inegalitarian principles at work during the Founding era with respect to citizenship laws, and, while acknowledging the influence of America's liberal and republican traditions, Smith argues that political elites have quite frequently structured "U.S. citizenship in terms of illiberal and undemocratic racial, ethnic, and gender hierarchies, for reasons rooted in basic, enduring imperatives of political life."[31] Thus, Smith interprets American political development through a "multiple traditions" paradigm, which recognizes "varying civic conceptions blending liberal, republican, and ascriptive elements in different combinations."[32] When assessing these competing traditions, moreover, Smith concludes that

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[29] *Ibid*., 214-215.

[30] See, for example, Paul Finkleman, ed., *Proslavery Thought, Ideology, and Politics* (New York: Garland Pub., 1989) and David F. Ericson, *The Debate over Slavery: Antislavery and Proslavery Liberalism in Antebellum America* (New York: New York University Press, 2000).

[31] Rogers Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven: Yale University Press, 1997), 1.

[32] *Ibid*., 8.

> . . . it does not appear possible to ground liberal democratic values on any unimpeachable evidence or reasoning from nature, divine will, or human history. This inability to appeal to unchanging, transcendental grounds places liberal democratic civic ideals at a great disadvantage in competition with many ascriptive ones.[33]

Once transcendent grounds for liberal civic ideals are abandoned as either philosophically unsound or impossible to ascertain, the "multiple traditions" paradigm seems to imply that the Lincolnian view of constitutional aspirationalism is an unreliable guide to interpreting the Constitution. Without a transcendent basis from which to judge the relative decency of various competing civic ideals, there seems to be no reason (other than preference) to privilege liberal ideals over illiberal ideals.

Mark Graber candidly embraces this dilemma in his work on the problem of constitutional evil. The task of modern constitutionalism, Graber suggests, is to secure peace between parties with competing conceptions of justice. Slavery engendered controversy in antebellum American precisely because there was no moral or constitutional consensus on the issue. Along with antislavery principles, the "racist and proslavery principles [the Taney Court] relied on" in *Dred Scott*, Graber argues, "had strong roots in both the Constitution and the American political tradition."[34] Aspirational arguments thus could not guarantee antislavery results because

> Racist and other ascriptive ideologies are as rooted in the American political tradition as liberal, democratic, and republican ideals. Americans cherished white supremacy. Policies preserving racial hegemony were means to valued ends, not temporary expedients.[35]

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[33] *Ibid*., 489.

[34] Mark Graber, *Dred Scott and the Problem of Constitutional Evil* (New York: Cambridge University Press, 2006), 76.

[35] *Ibid*., 82.

In addition to antislavery aspirationalism, Graber asserts, "Pro-slavery aspirationalism was similarly grounded in the original Constitution."[36] According to this view, then, Lincoln's argument against Taney's opinion in *Dred Scott* may have been effective political rhetoric, but it did not accurately assess the conflicted aspirational character of the Constitution and it did not adequately take into consideration the principal purpose of modern constitutionalism, which is to secure constitutional peace rather than constitutional justice (according to some contestable normative perspective).

An alternative modern theory of constitutional aspirationalism that attempts to bypass this historical dilemma locates constitutional aspirations in the contemporary polity rather than in the animating principles of the constitutional text. Against the Lincolnian interpretation, for example, Hendrik Hartog writes that "1787 is little more than a starting point for a variety of narratives of constitutional struggles over power, justice, autonomy, citizenship, and community."[37] Legitimate constitutional aspirations, according to Hartog, are the "aspirations of autonomous citizens and groups" who hold on to a "faith that the received meanings of constitutional texts will change" in light of those citizens' and groups' evolving "rights-consciousness."[38] According to this alternative view, Lincoln took part in the struggle over constitutional meaning, and he did so within a rhetorical framework of original intent and natural rights, but it is inaccurate, and perhaps irrelevant, to claim that Lincoln's specific aspirational arguments are historically or philosophically true.

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[36] *Ibid*., 82.

[37] Hendrick Hartog, "The Constitution of Aspiration and 'The Rights that Belong to Us All,'" *The Journal of American History*, 74(3):1013-1014.

[38] *Ibid*., 1015.

The constitutional theory of the late Supreme Court justice William Brennan rests somewhere in between Hartog's mere "starting point for a variety of narratives" and Lincoln's theory that constitutional aspirations were not contingent on the conceptions of each individual generation but were, in some sense, fixed by the events of 1776 and 1787. The amended Constitution, Brennan argued,

> . . . entrenches the Bill of Rights and the Civil War amendments, and draws sustenance from the bedrock principles of another great text, the Magna Carta. So fashioned, the Constitution embodies the aspiration to social justice, brotherhood, and human dignity that brought this nation into being. The Constitution and the Bill of Rights solemnly committed the United States to be a country where the dignity and rights of all persons were equal before all authority.[39]

Brennan also acknowledged, however, that the history of the United States revealed inegalitarian practices, and he insisted that the liberal tradition in American political development has too often been "more pretension than realized fact." Nonetheless, Brennan maintained, "we are an aspiring people, a people with a faith in progress." As such, "our amended Constitution is the lodestar for our aspirations" and the Constitution's "majestic generalities and ennobling pronouncements" call forth interpretation in light of the polity's contemporary aspirational ideals. Brennan, in other words, looked to the historical development of the substantive value choices of the Founders in light of the progress of contemporary society. Our acceptance of the Founding principles, Brennan asserted, "should not bind us to those precise, at times anachronistic, contours." Quoting Robert Jackson's opinion in *Board of Education v. Barnette* (1943), Brennan argued that the task of contemporary constitutional interpretation is to translate those "majestic generalities of the Bill of Rights, conceived

[39] William J. Brennan, "Speech to the Text and Teaching Symposium," (October 12, 1985), Georgetown University, Washington, D.C. <www.fed-soc.org/resources/id.50/default.asp> (Accessed 19 March 2009).

as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century."[40]

Contemporary aspirational theories thus have been occupied with articulating ways in which those majestic generalities might be translated into concrete restraints on government, and perhaps the most prominent of these theories has been offered by Ronald Dworkin. In his work on constitutional interpretation, Dworkin has called for "a fusion of constitutional law and moral theory," and he appeals to philosophical concepts, such as "public reason" and "human dignity," that have been developed at some length by the late twentieth-century philosopher John Rawls.[41] Notably, Rawls's theory of justice does not depend on any normative foundation outside of the political culture itself. Dworkin, in contrast to moral realists, similarly proposes to bring "*political* morality into the heart of constitutional law."[42] For this, Dworkin has embraced, in a limited sense, the label of "natural lawyer," but by this he means only to insist that his theory "makes the content of law sometimes depend on the correct answer to some moral question."[43] The judicial methodology, however, requires only that judges interpret "the political structure of their community in the following, perhaps special way: by trying to find the best *justification* they can find, in principles of political morality, for the structure as a whole."[44] In expounding the Dworkinian approach to constitutional interpretation, moreover, Sotirios Barber and James Fleming have suggested that interpreters must

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[40] *Ibid*.

[41] Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), 149.

[42] Ronald Dworkin, *Freeom's Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996), 2 [Italics added].

[43] Ronald Dworkin, "Natural Law Revisited," *University of Florida Law Review* (Winter 1982), 34(2):165-188.

[44] *Ibid*., 165.

"reflect critically upon our aspirations in striving for the interpretation that makes the Constitution the best it can be."[45]

ASPIRATIONALISM AND CONSTITUTIONAL INTERPRETATION

In their Dworkinian form, constitutional aspirations are the proper province of a Herculean judge, who will strive to interpret the principles of morality implicit in contemporary political culture in such a manner as to consistently come to the "correct" constitutional answer. In Lincoln's "Apple of Gold" metaphor, however, the question of whether or not the judiciary is in a unique position to authoritatively interpret the meaning and implications of constitutional aspirations for the rest of the polity demands a more nuanced answer. Indeed, the relationship between constitutional aspirations and constitutional adjudication became a particularly vexing issue for antislavery judges, who often emphasized the disparity between the deep principles of the Constitution and the particular requirements of the law. Confronted with what Robert Cover called the "moral-formal dilemma," judges emphasized their own impotence in deviating from the will of the people (expressed in the positive law) even when the formal legal requirements contravened principles of justice thought by judges to be embodied in the natural law.

Moderate antislavery public officials such as Lincoln suggested, however, that those very constitutional or statutory requirements could only be properly understood by considering the ends and purposes of the Constitution. In light of the Supreme Court's decision in *Dred Scott*, then, an additional question came to the surface—how shall citizens and public actors react when the Supreme Court itself interprets the Constitution

[45] Sotirios A. Barber and James E. Fleming, *Constitutional Interpretation: The Basic Questions* (New York: Oxford University Press, 2007), 160. See also, generally, Sotirios A. Barber, *On What the Constitution Means* (Baltimore: Johns Hopkins University Press, 1984).

incorrectly by neglecting to properly consider legitimate constitutional aspirations? Through his celebrated debates with Stephen Douglas regarding the authority of the Supreme Court's decision in *Dred Scott*, Lincoln developed a nuanced view of the proper role of the judiciary in expounding constitutional meaning, and, on the eve of taking office, in the midst of constitutional crisis, Lincoln reflected,

> I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such questions must be binding in any case, upon the parties to a suit; as to the object of that suit, while they are also entitled to a very high respect and consideration in all parallel cases by all other departments of the government . . . At the same time, a candid citizen must confess that if the policy of the government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of the eminent tribunal.[46]

Having been publicly accused by Douglas of inciting the people to mob violence and attempting to bring the Court into disrepute, Lincoln was forced to develop a coherent theory of judicial review that would respect the authority of the Court while denying the correlative doctrine of judicial supremacy. Lincoln thus argued that while Supreme Court decisions were authoritative and final for the parties involved in litigation, the principles of the Court's decision did not become binding as political rules for the coordinate branches of government unless they also accorded with the core meaning of the Constitution, which was understood in light of the teaching of the Declaration of Independence. As Jacobsohn argues, "Lincoln's response, to ignore the decision as a political rule, was predicated on the view that those sworn to uphold the Constitution

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[46] Abraham Lincoln, "First Inaugural Address" (4 March 1861) in Basler, ed., *The Collected Works of Abraham Lincoln*, 4:268.

have an obligation to advance the cause of constitutional principle, to the end of realizing the ideals of the Declaration of Independence."[47]

But if we reject the natural law principles in the Declaration, and, more generally, if we reject constitutional teleology, then it appears quite senseless to refer to the ends or purposes—the aspirations—of a written constitution at all. According to Mark Brandon, this precisely was the step taken by the Framers of the Constitution of 1787. "Stated most boldly," Brandon proclaims, "the Constitution represented a point of departure, a quantum step that led constitutionalism out of the old metaphysical paradigm of natural law and into a new paradigm in which constitutionalism is concerned with a particular kind of *enterprise*."[48] This "new constitutionalism" has a "discrete operating logic" that jettisons nature as a source of norms relevant to the constitutional project. Rather than being an attempt to secure rights that have a trans-historical basis, then, the new constitutionalism, on Brandon's account, is defined (without reference to its ends) as a certain type of activity—"an experiment in a particular mode of establishing, directing, and limiting political power"—that is itself historically contingent.[49]

Accordingly, constitutional failure with respect to slavery did not consist in a failure to protect the equal natural rights of slaves. Rather, the continued existence of slavery represented a failure to abide by the historically contingent standard, internal to the particular enterprise of modern constitutionalism, that the people should, through

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[47] Gary Jacobsohn, "Abraham Lincoln 'On this Question of Judicial Authority,'" *Western Political Science Quarterly* (March 1983), 36(1):68.

[48] Mark Brandon, *Free in the World: American Slavery and Constitutional Failure* (Princeton: Princeton University Press, 1998), 10.

[49] Mark Brandon, "Constitutionalism and Constitutional Failure," in *Constitutional Politics: Essays on Constitution Making, Maintenance, and Change*, eds. Sotirios A. Barber and Robert P. George (Princeton: Princeton University Press, 2001), 304.

reflection and choice, be able to "construct their political identities by reference to the Constitution." But this claim, Brandon points out,

> . . . does not rest on the notion that the Constitution violated the principle of 'human dignity.' It may well have done so, but within the assumptions of the new constitutionalism, invoking a standard of human dignity is problematic, not least because of its metaphysical roots. Human dignity evokes natural law and natural rights, which are off limits in the new constitutionalism.[50]

This new, substantively thin constitutionalism, Brandon further suggests, represents "our current conceptions of what a constitution and constitutional government are."[51]

If Brandon's account of our contemporary conceptions of constitutional government, as well as of the operating logic of the Constitution of 1787, is correct, however, then the constitutional theory championed by Lincoln was a relic of this new constitutionalism's early dissidents. For on Lincoln's account, the antebellum constitutional order failed because it turned away from the foundational logic of American government, summarized by the political teaching of the Declaration of Independence, that all men are created equal in terms of basic natural rights under the "Laws of Nature and Nature's God." Constitutional success or failure, accordingly, was understood in light of the overarching purpose of the constitutional enterprise, which, at a minimum, was to secure the equal natural rights of the governed. Slavery, according to this view, was aberrational to the principles undergirding American constitutionalism, and the continued existence of slavery—not to mention its enlargement and expansion—threatened to undermine the very structure of the constitutional regime.

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[50] *Ibid*., 306.
[51] Brandon, *Free in the World*, 11.

Lincoln's arguments were shared, moreover, by a larger antislavery constitutional tradition, and what has been overlooked, at times, in the literature on Lincoln is the fact that none of his arguments were original. The Lincolnian emphasis on natural law and natural rights, the antislavery character of the Constitution, the workings of providence in human affairs—even the power to abolish slavery during wartime—all had antecedents in American politics. In the following chapters, I explore some of these antecedents, and I focus on several interpretive and normative questions regarding American constitutional development and American constitutional theory within the context of the country's struggle with the institution of slavery. I begin with the famous English case of *Somerset v. Stewart* (1772) and the individual chapters proceed chronologically and thematically to the Civil War. I should here note that this project is not meant to be a comprehensive study of antislavery constitutionalism during the antebellum period; neither is it meant to offer a coherent theory of natural rights constitutionalism that can offer guidance for our vexing constitutional questions today. Rather, I offer in the following pages a series of studies on important cases, events, and ideas, which I hope will help us understand better the influence of natural law arguments on the process of American constitutional development while challenging some of the normative assumptions underlying recent scholarship on this topic.

In my analysis, I diverge from one of the dominant methodological approaches to constitutional scholarship, which emphasizes an epistemological separation of facts and values and offers a non-teleological definition of the phenomena that is being studied.[52] As George Thomas suggests, however, the purpose of modern constitutionalism is

[52] See, for example, Karren Orren and Stephen Skowronek, *The Search for American Political Development* (New York: Cambridge University Press, 2004). Orren and Skowronek define "development" as a "durable shift in governing authority."

precisely to fuse facts and values—or theory and practice—in such as way as to create and sustain a political regime through time. The very logic of modern constitutionalism thus calls into play certain metaphysical questions about identity that give life to a conception of constitutional "development" as directed toward certain ends.[53] As Jeffrey Tulis reminds us, moreover, when it comes to studying constitutions there is an "inextricable connection between descriptive and normative analysis."[54] This dissertation partakes of a kind of historical and theoretical inquiry that engages both facts and values and acknowledges the inextricable link between the two.

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The antislavery interpretation of American constitutionalism relied, in part, on a distinction between the requirements of the natural law and the law that was posited or set down by political authorities in a particular jurisdiction. Reflecting this understanding, the English jurist William Murray, Lord Mansfield, declared in 1772 that "Slavery is of such a nature . . . nothing can be suffered to support it but positive law."[55] Mansfield's declaration provided the framework for the constitutional debate over slavery both in England and in the American colonies, and antislavery constitutionalists in America later insisted that the provisions in the 1787 Constitution touching slavery were concessions to

[53] George Thomas, "What is Constitutional Development?" (2009), Unpublished manuscript in author's possession. E.g., how can a constitution maintain its identity through time? Can we identify one change as a "development" and another change as a "deterioration" or "disintegration"? What does it mean for a constitution to fail? For these types of questions, Thomas suggests that developmental approaches "are uniquely positioned to illuminate the logic and experience of constitutionalism in a manner that cannot be captured by more conventional political science methods." For example, see especially Gary Jacobsohn, "Constitutional Identity," *Review of Politics* (2006) 68(3): 361-397.

[54] Jeffrey K. Tulis, "On the State of Constitutional Theory," *Law & Social Inquiry* (1991) 16(4): 714.

[55] *Somerset* v. *Stewart* (1772) 1 Lofft 17.

interest rather than the demands of reason or justice; creatures, that is, only of positive law with no sanction in the law of nature.

In the following chapter, I describe the debate over Mansfield's declaration in early Anglo-American constitutional development. The majority of the legal arguments made at the bar in early slave-trade cases, I note, recognized slavery to be aberrational to the foundational logic of American government. I then conclude by considering two conservative judicial opinions in the 1820's: the American case of *The Antelope* (1825) and the English case of *The Slave Grace* (1827). Rather than reflecting the triumph of illiberal constitutional theories, I argue that these cases demonstrate the ongoing tension between normative constitutional principles and practical political considerations.

In chapter 3, I then explore the ubiquitous tension between natural law and positive law through a discussion of John Quincy Adams's argument before the Supreme Court in the case of *La Amistad* (1842). Adams's theoretical account of the disharmony between constitutional ideals and constitutional practices—what he deems "*fact against right*"—is a precursor to the arguments made by Lincoln a generation later. Specifically, Adams offers a nuanced theory of this disharmony in the antebellum constitutional order, dealing foremost with the philosophical problem of attempting to regard and treat men as property. From a vantage point that denies the relevance of natural law to constitutional interpretation, however, such an argument against chattel slavery seems to be irrelevant to any specific legal controversy.

In chapter 4, I thus turn to the often overlooked dissenting opinion of John McLean in the case of *Dred Scott v. Sandford* (1857) for an example of how such a consideration of natural law, within the confines of judicial reasoning, might influence

the way positive legal rules are constructed. McLean shared in common with Lincoln an aspirational theory of the Constitution and an emphasis on natural law that influenced his application of the Constitution's Fifth Amendment to the particular case at hand. Recent criticism of McLean's opinion, however, has suggested that, besides offering irrelevant legal arguments, he also needlessly exacerbated the sectional conflict over slavery. Such a criticism, moreover, is not confined to McLean (owing perhaps to the possible limitations of the judicial function) but has also been extended to Lincoln's actions as a candidate for public office.

In chapter 5, I therefore explore Lincoln's statesmanship in the aftermath of the *Dred Scott* decision. The primary modern criticism against Lincoln comes from neo-Hobbesian premises, emphasizing peace as the highest temporal good and jettisoning nature as a source of moral norms relative to American constitutionalism. Within the context of this literature, I argue that we must take seriously Lincoln's response to his own contemporaneous critics if we are to make intelligible his willingness to accept war rather than cede constitutional ground to proslavery forces. Explicit in Lincoln's arguments is an emphasis on the limits of prudence in constitutional statesmanship given the contingencies of human life, including the mysterious purposes of providence. This entire approach to constitutionalism is foreign to us today, however, and the legitimacy of such an approach is opposed chiefly by modern antifoundationalist constitutional theories.

In chapter 6, I contrast the antislavery constitutional tradition with the antifoundationalist assumptions of modern constitutional theory through an exploration of John Rawls's theory of public reason, which bars from public deliberation on matters

of constitutional essentials reasons that are based on comprehensive religious, moral, or philosophical doctrines. Rawls nevertheless argues that his theory is compatible with the religious rhetoric of American abolitionism during the 1850's. I argue, in contrast, that Rawls's theory not only is incompatible with religious abolitionism but also with much of the moderate antislavery constitutional tradition.

In conclusion, I then offer some reflections on the operational impact of the antislavery constitutional tradition within the context of Joseph Story's opinion in *Prigg* v. *Pennsylvania* (1842) and the continued existence of slavery in the world today.

Chapter 2: *Somerset* and the Antislavery Constitutional Tradition

By declaring in *Somerset v. Stewart* (1772) that the nature of slavery is "so odious . . . nothing can be suffered to support it but positive law," Lord Chief Justice Mansfield placed himself firmly in that jurisprudential tradition that distinguishes between the law of nature and the law posited in any particular jurisdiction.[56] Despite Mansfield's declaration, "*fiat justitia ruat caelum*,"[57] however, the judgment in *Somerset* merely maintained that slaves brought to England could not be forcibly removed from the Island without *habeas corpus* review. As the Chief Justice recognized, "The setting 14,000 or 15,000 men at once free loose by a solemn opinion, is much disagreeable in the effects it threatens," and the Court's judgment in *Somerset* was tempered by a due regard for political expedience.[58]

Whatever the limited holding of the case, the *Somerset* judgment did seem to imply that the master-slave relationship rested on a dubious legal foundation because of slavery's contrariness both to natural law and to the substantive principles of the English Constitution. After the American Revolution, moreover, the "decision took on a life of its own and entered the mainstream of American constitutional discourse," playing a particularly important role in American antislavery constitutionalism.[59] As Don Fehrenbacher notes, *Somerset* "became a major weapon in the arsenal of abolitionism, lending support to the argument that slavery was contrary to natural law and without legal

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[56] 1 Lofft 19. William Murray, Lord Mansfield, served as Chief Justice of the Court of King's Bench, the highest common-law tribunal in England.

[57] "Let justice be done though the heavens may fall."

[58] 1 Lofft 17.

[59] William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* (Ithaca: Cornell University Press, 1977), 21.

status beyond the boundaries of the jurisdiction establishing it by positive law."[60] At the dawn of the nineteenth century, the legislative criminalization of the transatlantic slave trades by the United Kingdom (1807) and the United States (1808) gave renewed energy to legal attacks on slavery based on this jurisprudential distinction between the law of nature and the local positive law.[61]

Although Mansfield's rhetorical attack on the nature of slavery in *Somerset* was subsequently treated as *dictum* that did not decide any specific point of law, the particularities of the newly suppressed slave trade and the ambiguities of international law brought forth cases in the early nineteenth century in which judges were invited to consider whether anything but positive law could be suffered to support the legal status of slavery. One type of novel legal case that was brought before judges in England and the United States involved slaves asserting their own claim to freedom by virtue of their temporary residence in jurisdictions that did not explicitly protect or sanction slavery through positive legislation. Absorbing the premise in *Somerset* that the status of slavery depends on local law, these individuals petitioned for their own freedom. "Once free for an hour, free forever" became the rallying cry of the Anglo-American abolitionist

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[60] Don Fehrenbacher, *Slavey, Law, & Politics: The Dred Scott Case in Historical Perspective* (New York: Oxford University Press, 1981), 28.

[61] During the first quarter of the nineteenth century, judges in the South as well as the North interpreted the principle of *Somerset* as declaring that slaves were effectively manumitted by their residence in free jurisdictions. For a description of Somerset's reception in the southern states, see Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill: The University of North Carolina Press, 1981), 187-234. Finkelman notes that the theoretical attack on the nature of slavery, which was the logical outgrowth of the principle in *Somerset*, also elicited a moral and political defense of slavery such that by the mid-1850's courts "openly debated whether free blacks were 'outlaws' or if they had any rights at all" (234). There are other events that cut against this trend as well, such as the passage of the Fugitive Slave Act of 1793, which sought to enforce interstate extradition of criminals and rendition of fugitive slaves as required by Article IV§2 of the U.S. Constitution. For an exploration of the legislative history of this congressional act, see Paul Finkelman, "The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793," *The Journal of Southern History* (1990) 56(3): 397-422.

movement. As freemen, they claimed, any reintroduction into a state of slavery constituted an illegal assault subject to *habeas corpus* review and judicial redress.

In the following sections of this chapter, I compare the theoretical bases of English and American constitutionalism, respectively, and I trace the principle posited in *Somerset* through a variety of cases occurring in the first quarter of the nineteenth century. In contrast to the linear constitutional narratives of what sometimes is pejoratively called "Whig history," I attempt to situate this study within a more convoluted political and historical context.[62] As Ken Kersch notes in the introduction to his revisionist account of the development of post-New Deal civil liberties jurisprudence,

> To the extent that political practice implicates important creedal principles . . . it also entails both contestation over the meanings of those principles and the perpetual imperative of making tragic choices between those principles—such as liberty and equality or privacy and publicity—when, as is commonly the case, one conflicts with another. The meanings are defined and choices made in concrete political circumstances and institutional contexts, with the decision in each case shot through with pull of specific, historically situated goals, aversions, hopes, and fears.[63]

The development of Anglo-American antislavery constitutionalism in the early nineteenth century particularly is amenable to an analysis that emphasizes the influence of creedal principles on the tragic constitutional choices made within concrete political and historical contexts. Antislavery jurists often invoked political and moral ideals to challenge contradictory institutional and social practices, but, as historically situated

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[62] See, for example, Ken Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (New York: Cambridge University Press, 2004). Quoting the historian Herbert Butterfield, Kersch describes Whig history as the "endeavor to cut 'a clean path through . . . complexity' through 'an over-dramatization of the historical story' that pits the forces of progress against the forces of reaction . ." (2). See Herbert Butterfield, *The Whig Interpretation of History* (New York: Norton, 1965).

[63] Kersch, *Constructing Civil Liberties*, 11.

actors, they seldom were faced with simple, unidimensional choices between, for example, freedom and slavery or egalitarianism and ascriptive hierarchism.

In several cases that involved slaves asserting their own claims to freedom, the lack of explicit, controlling legislative provisions further brought to the fray questions of higher background rules and fundamental constitutional commitments implicit in each tradition, including considerations of natural law. As I argue, there often was a certain tension between the universal and the particular elements at play in these cases, and this tension was brought to light by a judicial consideration of the relationship between the particular requirements of the positive law (as well as other prudential or strategic considerations) and the universal principles of liberty thought by judges to be embodied in the natural law. Following scholars such as Samuel Huntington and Gary Jacobsohn, I describe this tension between the universal and the particular elements in the constitutional orders as a kind of constitutional disharmony. Indeed, Jacobsohn, from a comparative perspective, argues that the problem of disharmony is a "universal constitutional condition" and Huntington, within the American context, notes that the "gap between promise and performance creates an inherent disharmony, at times latent, at times manifest, in American society."[64]

The practice of slavery in the Anglo-American world during the early nineteenth century provides what perhaps is the starkest example of discord between normative constitutional principles and existential realities, a disharmony John Quincy Adams later characterized as a great "conflict between the principle of liberty and the fact of

[64] Gary J. Jacobsohn, "The Disharmonic Constitution," presented at the Limits of Constitutional Democracy Conference, Princeton, New Jersey, 1; Samuel P. Huntington, *American Politics: The Promise of Disharmony* (Cambridge, MA: Harvard University Press, 1981), 12.

slavery."[65] The notion that American ideals have been at odds with American practice, however, is a contested premise. Scholars associated with Critical Race Theory, in particular, have challenged the thesis that liberal ideals are necessarily opposed to slavery and other forms of racially ascriptive hierarchies.[66] In addition, the empirical claim that the ideals (as opposed to the practices) of Americans have predominately been liberal has itself been challenged by scholars such as Rogers Smith, who argue that "American politics is best seen as expressing the interaction of multiple political traditions, including *liberalism*, *republicanism*, and *ascriptive forms of Americanism*, which have collectively comprised American political culture, without any constituting it as a whole."[67]

Mark Graber's recent revisionist account of the Supreme Court's proslavery ruling in *Dred Scott v. Sandford* (1857) highlights some of the normative questions that emerge from viewing American constitutional development through a multiple traditions paradigm. American antislavery constitutionalism in the nineteenth-century rested on the premise that even the slavery-related clauses in the Constitution aspired toward a certain liberal constitutional vision that was not yet a reality. One specific interpretive difficulty attending such a theory of constitutional aspiration is the claim that, with respect to slavery, illiberal as well as liberal principles animated the antebellum constitutional order. This is the charge leveled by Graber at aspirational theories generally: "The racist

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[65] John Quincy Adams, *Memoirs of John Quincy Adams* (13 December 1838), ed., Charles Francis Adams (Philadelphia: J.B. Lippincott & Company), 10:39.

[66] See, for example, John Hope Franklin, *Race and History: Selected Essays, 1938-1988* (Baton Rouge: Louisiana State University Press); Jennifer Hochschild, *The New American Dilemma: Liberal Democracy and School Desegregation* (New Haven: Yale University Press, 1984); Charles W. Mills, *The Racial Contract* (Ithaca: Cornell University Press, 1997).

[67] Rogers Smith, "Beyond Myrdal, Tocqueville, and Hartz: The Multiple Traditions in America," *The American Political Science Review*, Vol. 87, 1993, pp. 549-566. Cf. Alexis de Tocqueville, *Democracy in America*, trans. Gerald E. Bevan (New York: Penguin Books, 2003); Gunnar Myrdal, *An American Dilemma: The Negro Problem and American Democracy* (New York: Harper and Row, 1944); Louis Hartz, *The Liberal Tradition in America* (New York: Harcourt, 1955).

and proslavery principles [the Court] relied on" in *Dred Scott*, Graber argues, "had strong roots in both the Constitution and the American political tradition."[68] Aspirational arguments could not guarantee substantively just results because,

> Racist and other ascriptive ideologies are as rooted in the American political tradition as liberal, democratic, and republican ideals. Americans cherished white supremacy. Policies preserving racial hegemony were means to valued ends, not temporary expedients.[69]

Yet many of these revisionist accounts—whether stemming from Critical Race Theory or from the multiple traditions approach—focus on the Jacksonian, Civil War, or Reconstruction eras.

The defense of slavery as a positive good as well as an entrenched constitutional value, rather than a necessary evil temporarily protected by constitutional compromise, was, however, much more prevalent after 1830. Even a young Roger Taney, author of the Court's notorious proslavery opinion in *Dred Scott*, assented to the tenants of the antislavery constitutional tradition while working as a lawyer in 1819. "A hard necessity," Taney argued,

> . . . compels us to endure the evil of slavery for a time. It was imposed upon us by another nation, while we were yet in a state of colonial vassalage. It cannot be easily or suddenly removed. Yet while it continues it is a blot on our national character, and every real lover of freedom confidently hopes that it will be effectually, though it must be gradually, wiped away; and earnestly looks for the means, by which this necessary object may best be attained. And until it shall be accomplished: until the time shall come when we can point without a blush, to the language of the Declaration of Independence, every friend of humanity will seek to lighten the galling chain of slavery, and better, to the utmost of his power, the wretched condition of the slave.[70]

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[68] Mark Graber, *Dred Scott and the Problem of Constitutional Evil* (New York: Cambridge University Press, 2006), 76.

[69] *Ibid*., 77.

[70] Roger B. Taney, "Speech in Defense of the Rev. Jacob Gruber." In Clement Eaton, *Freedom of Thought in the Old South* (Duke University Press, 1940), 131. Gruber was a Free Black Methodist

Only later did Taney adopt the position, which informed his *Dred Scott* opinion, that "it is too clear for dispute, that the enslaved African race were not intended to be included" under the egalitarian principles of the Declaration of Independence.[71]

By focusing on the influence of *Somerset* on Anglo-American constitutional development during the first quarter of the nineteenth century, I seek to supplement and challenge both the traditional "Whiggish" constitutional narratives of inevitable liberal progress and the various revisionist accounts that suggest proslavery principles are *as rooted* in the Anglo-American constitutional tradition as antislavery principles. The early nineteenth century trend of judicially extending the general principles of liberty implicit in *Somerset* was halted by conservative decisions in the American case of *The Antelope* (1825) and the English case of *The Slave Grace* (1827), which are remarkably similar in principle despite their emergence in different constitutional contexts.[72] Rather than reflecting the vindication of proslavery aspirations, equally rooted in the constitutional tradition, I argue that these conservative opinions represent misguided judicial efforts to hold together increasingly disharmonic constitutional orders. As an interpretative paradigm, the concept of constitutional disharmony is helpful in explaining the ways in which the English and American constitutions contained internally discordant elements

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preacher indicted for attempting to "unlawfully and maliciously incite the slaves" at a Methodist camp meeting in Maryland.

[71] *Dred Scott v. Sandford*, 60 U.S. 393 (1857) at 407 (Taney, J.).

[72] In depicting this early nineteenth century contest over constitutional principles and the practice of human bondage, I employ the term "liberal"—as distinguished from *liberalism*—in a very broad sense to connote a partisanship for liberty as opposed to slavery. I use the term "conservative," on the other hand, as a relative term that connotes the conservation of the *status quo* with respect to slavery. In any historical work, the terms "liberal" and "conservative" are potentially anachronistic, not least because of the association of those terms with contemporary politics or political theory. As Rogers Smith notes, "the term *liberalism* (as opposed to *liberty* or *liberal*) was in fact infrequently used in English-speaking countries until the last half of the nineteenth century." See Rogers Smith, "Liberalism and Racism: The Problem of Analyzing Traditions," in David F. Ericson and Louisa Bertch, eds., *The Liberal Tradition in American Politics: Reassessing the Legacy of American Liberalism* (New York: Routledge), 15.

while nonetheless emphasizing the "primacy of particular aspirations within an ongoing dynamic of disharmonic contestation."[73] The increasing disharmony in the constitutional orders did, of course, reflect competing constitutional visions, but it would be a mistake to treat all constitutional visions as equal or to fail to discriminate between those principles which are fundamental and those which are aberrational to the foundations of Anglo-American constitutionalism. In fact, the fundamental principles undergirding both the English and American claims to constitutional liberty offered a strong normative challenge to the existing institution of chattel slavery.

ANGLO-AMERICAN CONSTITUTIONALISM AND THE CHALLENGE OF SLAVERY

If English and American constitutional thought rests on any one shared constitutional principle, surely it is that subject and sovereign alike are to be ruled by the law. In the thirteenth century, the English jurist and legal commentator Henry de Bracton wrote, "For the King ought not to be under man but under God and under the law, because the law makes the king. Let the King therefore bestow upon the law what the law bestows upon him, namely dominion and power, for there is no King where will rules and not law."[74] Bracton no doubt had in mind some of the recent provisions of Magna Carta (1215), which provided a formal codification of this principle. The rebel Barons who imposed Magna Carta on King John were animated by a desire to limit arbitrary executive power, and in Chapter 39 of that document they secured a promise from the

[73] Jacobsohn, "The Disharmonic Constitution," 9.

[74] Henry de Bracton, *On the Laws and Customs of England* (written between 1235-1259), quoted in Albert White, *The Making of the English Constitution: 449-1485* (New York: Knickerbocker Press, 1908), 268.

Monarchy that "No free man shall be arrested or imprisoned, or disseised or outlawed or exiled or in any way victimised, neither will we attack him or send anyone to attack him, except by the lawful judgment of his peers or by the law of the land."[75] In the fourteenth century, Chapter 39 was redrafted by Parliament to apply not only to free men but to any man "of whatever estate or condition he may be," and this process of reinterpretation continued throughout the next several centuries as Parliament expanded "the Charter's special 'liberties' for the privileged classes to general guarantees of 'liberty' for all the king's subjects."[76]

The principle that individuals ought not be "in any way victimised" but "by the law of the land" was given legal force in the common law through the writ of *habeas corpus*, which allowed an individual to legally challenge the grounds of his detention or molestation. According to Blackstone, that Great Charter in its variety of manifestations throughout the years "was for the most part declaratory of the fundamental laws of England."[77] Furthermore, the Charter's principle of individual liberty was so well enshrined in the canons of jurisprudence operative in the American colonies (and later states) that the U.S. Constitution simply assumed the principle was operative in the newly created federal regime as well. Article III provided that "The privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it,"[78] and, in a concession to the Anti-Federalists, the Fifth Amendment to the Constitution succinctly reiterated the principle behind *habeas corpus*

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[75] *Magna Carta* (1215), Article 39, in Ralph Turner, *Magna Carta Throughout the Ages* (London: Pearson, 2003), 231.

[76] Ralph Turner, *Magna Carta*, 3.

[77] William Blackstone, *The American Students' Blackstone: Commentaries on the Laws of England in Four Books*, 3rd ed. (Albany, NY: 1899), 66.

[78] United States Constitution, Art. 3§9.

review: "No person . . . shall be deprived of life, liberty, or property without due process of law."

As Bernard Bailyn notes, "The colonists' attitude to the whole world of politics was fundamentally shaped by the root assumption that they, as Britishers, shared in a unique inheritance of liberty." That liberty was secured to them by the English Constitution, which was "the constituted—that is, existing—arrangement of governmental institutions, laws, and customs together with the principles and goals that animated them."[79] It is true that British legal commentators such as Bracton, Coke, and Blackstone had identified the common law with principles of natural law, and a "belief that a proper system of laws and institutions should be suffused with, should express, essences and fundamentals—moral rights, reason, justice—had never been absent from English notions of the constitution."[80] Nevertheless, English constitutional thought also had never considered the laws and institutions of England as something theoretically distinct or separate from the English Constitution. As the colonists began enumerating grievances against those very English laws and institutions (often invoking the authority of natural law), it soon became evident that it would be politically foolish and perhaps theoretically misguided to ground their claim to rights in the English Constitution itself.

Gordon Wood writes that "By 1776, the Americans had produced out of the polemic of the previous decade a notion of a constitution very different from what eighteenth century Englishmen were used to—a notion of a constitution that has come to

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[79] Bernard Bailyn, *The Ideological Origins of the American Revolution*, 2nd ed. (Cambridge: Harvard University Press, 1992), 66.

[80] *Ibid*., 69.

characterize the very distinctiveness of American political thought."[81] In their rhetorical battle with the Crown, Americans attempted to separate "principles from government, constitutional from legal." This new understanding of a constitution outlived the circumstances that gave rise to it, and, in 1787, the delegates to the constitutional convention endeavored to lift some principle out of the political environment by enshrining them as fundamental or higher "constitutional" laws. The constitution was no longer synonymous with the government, and ordinary legislation now could be measured against some set of enshrined higher background rules. In place of the traditional understanding of a constitution, the Americans championed "a deliberately contrived design of government and a specification of rights beyond the power of ordinary legislation to alter."[82] This new understanding is what modern commentators have broadly come to call "constitutionalism" as opposed to the older understanding, which merely connoted an experiential constitution—or institutional arrangement—of government.

Englishmen, of course, took pride in their own particular constitution. It was through the English Constitution, after all, that the principles of Magna Carta were continually reaffirmed. Blackstone had observed that "The absolute rights of every Englishman . . . are coeval with our form of government," and the liberties of Englishmen were associated principally with "that great charter of liberties."[83] Indeed, that charter of liberties inculcated principles that were identical with the principles undergirding the new

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[81] Gordon Wood, *The Creation of the American Republic: 1776-1787*, 2nd ed. (Chapel Hill: The University of North Carolina Press, 1998), 260. Wood goes on to note, "So enthralled with their idea of a constitution as a written superior law set above the entire government against which all other law is to be measured that it is difficult to appreciate a contrary conception."

[82] Bailyn, *Ideological Origins*, 68.

[83] Blackstone, *Commentaries on the Laws of England*, 66.

American constitutionalism: limited government; supremacy of the rule of law; and condemnation of arbitrary power. But the "security of rights under the old constitutional system had been custom," and when Parliament began to move against ancient custom the American colonists perceived that their rights were not secured by any fundamental restraint on the will of Parliament.[84]

That narrative, at least, informed the polemic issued against the English Constitution by the Americans. James Wilson, that early expounder of American law, summarized this position when he wrote, "The order of things in Britain is exactly the reverse of things in the United States. Here, the people are masters of the government. There, the government is master of the people."[85] In his opinion in *Chisholm v. Georgia* (1794), Wilson explained that the new American science of jurisprudence rested on a fundamentally different foundation than had the jurisprudence of the mother country: "To the Constitution of the United States the term SOVEREIGN, is totally unknown."[86] In England, it was said that "the King or sovereign is the fountain of Justice," but "another principle, very different in its nature" was operative in America. That principle, according to Wilson, was that "The sovereign, when traced to his source, must be found in the man."[87] The people, in their corporate capacity, were to be sovereign over the

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[84] John Phillip Reid, *Constitutional History of the American Revolution* (Madison: The University of Wisconsin Press, 1986), 9. Thomas Paine, for example, argued that ". . . it is wholly owing to the constitution of the people, and not the constitution of the government that the crown is not as oppressive in England as in Turkey," and Paine drew a stark distinction between a constitution antecedent to government and the English Constitution, which, according to Paine, was synonymous with unlimited government. See Thomas Paine, "Common Sense" (1776) in William M. Vander Weyde, ed., *The Life and Works of Thomas Paine*, vol. 2 (New Rochelle, NY: Thomas Paine National Historical Association, 1925). The differences between the American and English Constitutions on this score have perhaps been overemphasized. See, in particular, Charles McIlwain, *Constitutionalism Ancient and Modern* (Ithaca: Cornell University Press, 1947), 1-22.

[85] James Wilson, *The Works of the Hounorable James Wilson*, vol. 1 (Philadelphia, 1804), 425.

[86] *Chisholm v. Georgia* (1794), 2 U.S. 419 at 454 (Wilson, J.).

[87] *Ibid.*, 458.

government, and, as Hamilton argued in Federalist no. 78, the will of the people was "declared in the constitution" such that this declaration enjoyed preeminence over "the will of the legislature declared in its statutes."[88]

Despite the American parry against the doctrine of Parliamentary sovereignty, however, the substantive principles of the English Constitution were still understood by Englishmen to consist of those same principles undergirding American constitutional thought. The mode of government operation was different, to be sure: In England, "Every act of Parliament was in a sense a part of the constitution, and all law, customary and statutory, was thus constitutional."[89] Yet the rights of Englishmen, established and secured by Parliament, were nevertheless understood to be "founded on nature and reason" even if they were at times existentially denied and left insecure, "their establishment, excellent as it is, still being human."[90] The principal disagreement between the American and English jurists, then, was a disagreement on how effectively to secure those rights, founded on nature and reason, through the creation and maintenance of a constitutional order.

For both Americans and Englishmen, the existence of legal slavery provided a challenge to the fundamentals of their own constitutional thought. The principles of African slavery, as it was found in the English colonies, including the American colonies, were diametrically opposed to Anglo-American constitutional principles. This particular system of chattel slavery established the private despotism of one man over another; the rule of private human will instead of the rule of law; and the expansion and enlargement

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[88] "The Federalist No. 78," in *The Federalist* (The Gideon Edition), eds., George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001), 420.

[89] Wood, *Creation of the American Republic*, 261.

[90] Blackstone, *Commentaries on the Laws of England*, 66.

of arbitrary power. If a system of chattel slavery was to subsist under a regime of liberty, then the questions properly arose: Are the rights to liberty merely conventional rights, inhering in Englishmen *qua* Englishmen (or Americans *qua* Americans) or do some fundamental rights inhere in man *qua* man? Further, if there are rights that inhere in man *qua* man, do these rights apply to Africans, and, if so, are these rights justiciable in courts of law? These questions uncover a tension between universal and particular elements at work in the English and American claim to liberty. In order to maintain a system of chattel slavery and simultaneously assert a constitutional right to be free from arbitrary exercises of force, one had to either deny the humanity of the slave or deny the relevance of human status to the claim of liberty under the Constitution. In this respect, one could deny the Africans' participation in the universal rights of man, altogether deny the existence of any such universal rights, or concede that universal rights do apply to the Africans while nevertheless asserting that such rights are not secured by the particular constitution in question.

It is this tension between the universal and the particular that Blackstone attempted to navigate in that section of his *Commentaries* titled "Of Master and Servant." "The principle aim of society," Blackstone wrote, "is to protect individuals in the enjoyment of those absolute rights, which were invested in them by the immutable laws of nature."[91] Those absolute rights inhering in man by nature served to underpin that spirit of liberty, which, Blackstone declared, "is so deeply implanted in our constitution, and rooted even in our very own soil, that a slave or a negro, the moment he lands in England, falls under the protection of the laws, and so far becomes a freeman, though the

[91] Blackstone, *Commentaries on the Laws of England*, 63.

master's right to his services may *possibly* still continue."[92] Blackstone qualified his teaching on natural liberty with a concession that a master may still have certain rights to a slave's labor under the English Constitution, though that same Constitution afforded certain legal protections to all English residents, including slaves. Perhaps Blackstone still had in mind some limited a qualified right of a master to the services of a slave when he wrote that "pure and proper slavery does not, nay cannot, subsist in England: such I mean, whereby an absolute and unlimited power is given to the master over the life and fortune of the slave."[93]

In the American context, Wilson had asserted that the entire basis of American law rested on an understanding that "man, fearfully and wonderfully made, is the workmanship of his all perfect Creator" and that arbitrary power degrades "man from the prime rank, which he ought to hold in human affairs."[94] Wilson considered man, in his individual capacity, to be central to the construction of American law. "A state," Wilson reflected, ". . . is the noblest work of Man; But Man himself, free and honest, is, I speak as to this world, the noblest work of God."[95] Wilson also understood the inconsistency of the primacy of man in the constitutional order with the existence of African slavery, having approvingly quoted the abolitionist French statesman Jacques Necker in the Pennsylvania Ratifying Convention, saying to his fellow legislators that "we pride ourselves on the superiority of man, and it is with reason that we discover this superiority

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[92] *Ibid*., 65-66. Wiecek notes that the first edition of Blackstone's *Commentaries* did not include the disclaimer that "the master's right" to the service of the slave might still have a legitimate basis in England, and the claim to liberty for the slave in the first edition was categorical. But, Wicek writes, Blackstone was so "troubled by the potential antislavery uses to which the libertarian part of his writings" were being put by abolitionist leaders such as Granville Sharp that he tempered this passage in the third edition of the Commentaries to concede a limited right of a master to the services owed by a slave. See Wiecek, *The Sources of Antislavery Constitutionalism*, 27.

[93] *Ibid*., 127.

[94] *Chisholm v. Georgia* (1794) at 455 and 461 (Wilson, J.).

[95] *Ibid*., 462-463.

in the wonderful and mysterious unfolding of the intellectual faculties; and yet the trifling difference in the hair of the head, or in the color of the epidermis, is sufficient to change our respect into contempt."[96] Like Blackstone, however, Wilson perceived his own Constitution as a repudiation of the principles upon which the institution of slavery rested: The various clauses in the Constitution dealing with representation, the importation of persons, etc., Wilson asserted, lay "the foundation for banishing slavery out of this country."[97]

The antislavery sentiments of eminent and formative jurists such as Blackstone and Wilson notwithstanding, the fact remained that the rights of a master over his slave had long been customarily recognized in the British Empire, and compromises with the slave interest were imbedded—as scaffolding perhaps, but imbedded nonetheless—in the fundamental law of the American regime.[98] Moreover, after the legislative criminalization of the transatlantic slave trades in the United Kingdom and the United States in the early nineteenth century, the tension between the universal rights of man and the conventional rights of particular men became quite pronounced through legal battles over the status of captured or imported slaves. In several cases, lawyers for plaintiffs suing for their own freedom urged the courts to consider Mansfield's judgment in

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[96] James Wilson, "Speech at the Pennsylvania Ratifying Convention," in Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, 2nd ed. (New York: Burt Franklin, 1888). In Philip B. Kurland and Ralph Lerner, eds., *The Founder's Constitution*, 5 vols. (Chicago: University of Chicago Press, 1987), 3:283-284.

[97] *Ibid*.

[98] Abolitionists such as Frederick Douglass later argued that "the Federal Government was never, in its essence, anything but an anti-slavery government . . . It was purposely so framed as to give no claim, no sanction to the claim of property in man. If in its origin slavery had any relation to the government, it was only as the scaffolding to the magnificent structure, to be removed as soon as the building was completed." See Frederick Douglass, "Address for the Promotion of Colored Enlistments." In Philip S. Foner, ed., *The Life and Writings of Frederick Douglass,* 4 vols. (New York: International Publishers), 3:361-66. That the Constitution of 1787 was essentially antislavery is, of course, a controversial claim. See Paul Finkelman, *An Imperfect Union*, 236-284 and Mark Graber, *Dred Scott and the Problem of Constitutional Evil*, 91-168.

Somerset as establishing the principle upon which the slaves asserted their claim to liberty. In the following sections, I explore the principle posited in *Somerset* along with two subsequent judicial opinions in *The Antelope* (1825) and *The Slave Grace* (1827). In both of these cases, judges recognized that there was a tension between the conventional rights of the master and the natural rights of the slave, but nevertheless asserted that they were compelled by "the path of duty"—to use a phrase from Marshall's opinion in *The Antelope*—to vindicate the conventional rights of the slave owners.

THE *SOMERSET* JUDGMENT

James Somerset was an African-born Virginia plantation slave who was brought to England by his master in the late 1760's. After a foiled runaway attempt, Somerset was bound and held on board an English vessel that was scheduled to set sail for Jamaica, where he was to be sold as punishment for his conduct. After hearing of Somerset's situation, Granville Sharp along with several other antislavery leaders successfully petitioned Lord Mansfield to issue a writ of *habeas corpus* to review the legality of Somerset's detention.[99] Sharp's friend, Francis Hargrave, served as counsel for Somerset, and Hargrave's argument—developed in collaboration with Sharp—rested on several key premises that had gained acceptance in England's nascent antislavery societies.

In his argument before the Court, Hargrave first asserted that a master's claim over his slave was "opposite to natural justice" and that this understanding was

[99] Granville Sharp had been putting together arguments that would attack slavery as "plainly contrary to the laws and constitution of this kingdom," and Somerset's case provided an opportunity to put these arguments before a judicial tribunal. See Granville Sharp, *A Representation of the Injustice and Dangerous Tendency of Tolerating Slavery; or of Admitting the Least Claim of Private Property in the Persons of Men, in England* (London: Benjamin White and Robert Horsfield, 1769), 40-41.

corroborated by the writings of various philosophers such as Grotius, Montesquieu, Pufendorf, Rutherford, and Locke. Next, he suggested that "the genius and spirit of the constitution" forbade the existence of slavery in England, because the perpetuation of slavery depended on slave codes that established "arbitrary maxims and practices" that were repugnant to the rule of law under the English Constitution.[100] Because slavery was contrary to the law of nature, moreover, Hargrave argued that the legal claim of a master over a slave depended on the local law in force (instead of some abstract property right in a slave), and the law of England "does not invest another man with despotism."[101] Furthermore, because "the right of the master [in this case] depends on the condition of slavery . . . in *America*,"[102] the master's absolute claim over his slave was voided by virtue of their residence in England. Thus, under English law the slave was afforded judicial protection from arbitrary detention and deportation against his will: "From the submission of the negro to the laws of England, he is liable to all their penalties, and consequently has a right to their protection."[103] In this way, Somerset's attorneys initiated a two pronged assault on slavery in England by arguing that it was repugnant to the "natural rights of mankind" as well as contrary to the particular genius of the English Constitution.[104]

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[100] 12 Geo. 3 K.B. at 2.
[101] *Ibid*., 3.
[102] *Ibid*., 4.
[103] *Ibid*., 5.
[104] *Ibid*., 2. Hargrave's co-counsel, Mr. Alleyne, particularly emphasized the first point, asserting that a man cannot part with his natural rights "without ceasing to be a man; for they immediately flow from, and are essential to, his condition as such." He then went on to summarize the argument being put forward on behalf of Somerset: "Slavery is not a natural, 'tis a municipal regulation; an institution therefore confined to certain places, and necessarily dropped by a passage into a country where such municipal regulations do not subsist." See *ibid*., 6.

Mansfield was favorably inclined to the arguments put forward by Somerset's attornerys, though he recognized the danger of positing a principle that would effectively free the 14,000-15,000 slaves being held in England. The counsel for Somerset's master had warned that "There are very strong and particular grounds of apprehension, if the relation in which [the slaves] stand to their masters is utterly to be dissolved on the instant of their coming into *England*."[105] While noting "the disagreeable effects" that such a situation threatened, including "the many thousands of pounds" that would be lost by slave owners, Mansfield maintained that practical considerations could not alter his judicial duty: "Compassion will not, on the one hand, nor inconvenience on the other, be to decide; but the law."[106] And in interpreting the law, Mansfield reiterated many of the arguments put forward by Hargrave:

> The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory; It's so odious, that nothing can be suffered to support it but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.[107]

Mansfield's judgment said nothing of slavery in the English colonies; neither did it hint at any legal implications for the colonial slave trade. The Chief Justice also specifically asserted that a limited right of a master to the services of his slave did exist in England.[108] It was the particular act of binding Somerset in order to sell him abroad that Mansfield declared to be "so high an act of dominion" that "it must be recognized by the law of the

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[105] *Ibid*., 10.

[106] *Ibid*., 8 and 17.

[107] *Ibid*., 19.

[108] Mansfield began his opinion by asserting that "Contract for sale of a slave is good here; the sale is a matter which the law properly and readily attaches, and will maintain the price according to the agreement." See *ibid*., 17.

country where it is used."[109] In its direct application, then, the famous *Somerset* decision merely established that slaves held in England could challenge their detention or treatment on grounds of *habeas corpus*—not an unsubstantial ruling but also not the ruling that abolitionists like Sharp and Hargrave were looking for. Nonetheless, Mansfield's teaching that slavery was contrary to natural law—and correlatively that nothing could establish slavery except positive law—had a reverberating influence on Anglo-American antislavery constitutionalism.

ANTISLAVERY CONSTITUTIONALISM AFTER THE CLOSING OF THE SLAVE TRADES

A half century after the judgment in *Somerset v. Stewart*, the Anglo-American constitutional debate over slavery continued to occur within the framework established by Mansfield. A series of legislative enactments concerning the slave trades in the England and the United States had brought forth novel legal cases that required judges to decide precisely whether anything but positive law could be suffered to support the status of slavery. Relying on Mansfield's reasoning in Somerset, antislavery lawyers argued that slaves became free by virtue of their temporary residence in jurisdictions that did not explicitly protect slavery. As freemen, it was then argued, these persons could not be forcibly transported into another jurisdiction for the purposes of dealing with them as slaves. In the absence of specific legislative provisions guiding the particularities of these cases, English and American jurists considered questions of fundamental law as well as

[109] *Ibid*., 19.

what was ambiguously termed the "law of nations."[110] Often these considerations required looking beyond any particular text to the animating principles of the Constitution—or, perhaps more broadly, to the animating principles of modern constitutionalism.

In the fifty or so years that had passed since Mansfield issued his decision in *Somerset*, moreover, there was a clear line of legislative and judicial activity in England and the United States tending toward an expansion of liberty for human beings as such.[111] In March of 1807, both the British Parliament and the United States Congress passed legislation that criminalized the transatlantic slave trades.[112] The earliest judicial decision coming out of this legislation was the English case of *The Amedie* in 1810.[113] Following the logic of *Somerset*, Sir William Grant wrote for the high court of admiralty that the slave trade—because of its contrariness to natural law—"cannot, abstractedly speaking, be said to have a legitimate existence."[114] Trafficking in slaves was thus held to be *prima facie* illegal unless the claimant could prove that his title or right to property in a certain

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[110] For a discussion of the various ways in which the "law of nations" was understood in the nineteenth century, see Henry Wheaton, *Elements of International Law* (Philadelphia: Carey, Lea & Blanchard, 1836). The law of nations, according to Wheaton, consisted of "the rules and principles which govern, or are supposed to govern, the conduct of states in their mutual intercourse in peace and in war." This law, Wheaton further summarized, was "supposed to be founded on the higher law sanction of the Natural Law," and it included both international positive law (e.g., treaties) and principles of natural justice (iii).

[111] For an overview of some of the antislavery legislation during the revolutionary period, see Fehrenbacher, *Slavery, Law & Politics*. "The antislavery tendencies of the revolutionary period," Fehrenbacher notes, "were not inconsiderable. State after state took steps to end the African slave trade. Abolition of slavery itself was achieved in New England and Pennsylvania, and it seemed only a matter of time in New York and New Jersey. Virginia gave strong encouragement to private manumissions by removing earlier restrictions upon them, and both Maryland and Delaware subsequently followed her example. By the 1790's, abolition societies had appeared in every state from Virginia northward, with prominent [break] men like Benjamin Franklin and John Jay in leading roles. And Congress in 1787 prohibited slavery in the Northwest Territory with scarcely a dissenting vote" (8-9).

[112] The Congressional act was to go into effect on June 1, 1808. See U.S. Constitution, Art. I § 9, prohibiting the abolition of the slave trade by the national legislature until 1808.

[113] *The Amedie* (1810), 1 Acton 240. The "Amedie" was sailing under the flag of the United States with a cargo of 105 slaves. A British cruiser confiscated the ship and cargo and brought the cargo, including the slaves, into a vice-admiralty court for adjudication.

[114] *Ibid*.

slave was expressly declared by the "particular law of his own country."[115] According to Grant, then, the judicial posture on claims for the "restoration of human beings" was to be in favor of liberty unless it could be unequivocally shown that the individuals were being held as slaves under some expressly decreed provision of local municipal law. This principle was reiterated by Sir William Scott, Lord Stowell, in *The Fortuna* (1811) and *The Donna Marianna* (1812) before entering American constitutional jurisprudence through Joseph Story's opinion in *La Jeune Eugenie* (1822).[116]

Justice Story's antislavery views were well known long before his hearing of this case.[117] Before a Boston Grand Jury in 1819, Story had proclaimed,

> Our constitutions of government have declared, that all men are born free and equal, and have certain unalienable rights, among which are the right of enjoying their lives, liberties, and property, and of seeking and obtaining their own safety and happiness. May not the miserable African ask, 'Am I not a man and a brother?' We boast of our noble struggle against the encroachments of tyranny, but do we forget that it assumed the mildest form in which authority ever assailed the rights of its subjects; and yet there are men among us who think it no wrong to condemn the shivering negro to perpetual slavery?[118]

It perhaps is not surprising, then, that Story condemned the nature of the slave trade with forceful rhetoric in his *La Jeune Eugenie* opinion. The slave trade, Story asserted,

> . . . begins in corruption, and plunder, and kidnapping. It creates and stimulates unholy wars for the purpose of making captives. It desolates whole villages and provinces for the purpose of seizing the young, the feeble, the defenceless, and the innocent. It breaks down all the ties of parent, and children, and family, and country. It shuts up all sympathy for

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[115] *Ibid*.

[116] *The Fortuna* (1811), 1 Dodson 81; *The Donna Mariana* (1812), 1 Dodson 91; *La Juene Eugenie*, 26 Federal Cases at 832-851. "La Juene Eugenie" was an American-made vessel flying under a French flag that was captured by an American schooner off the coast of Africa on suspicion of engaging in the slave trade.

[117] See chapter 7 for a discussion of Story's seemingly pro-slavery opinion in *Prigg v. Pennsylvania* (1842). Certainly, the disparity between Story's early antislavery assertions and the decision he rendered in *Prigg* presents a challenge to my thesis concerning the relevance or operation impact of the antislavery tradition in constitutional adjudication.

[118] Story, *The Life and Letters of Joseph Story*, 340-341.

> human suffering and sorrows. It manacles the inoffensive females and the starving infants. It forces the brave to untimely death in defence of their humble homes and firesides, or drives them to despair and self-immolation. It stirs up the worst passions of the human soul, darkening the spirit of revenge, sharpening the greediness of avarice, brutalizing the selfish, envenoming the cruel, famishing the weak, and crushing to death the broken-hearted. This is but the beginning of the evils. . . All the wars, that have desolated Africa for the last three centuries, have had their origin in the slave trade. The blood of thousands of her miserable children has stained her shores, or quenched the dying embers of her desolated towns, to glut the appetite of slave dealers.[119]

This litany of evils was relevant precisely because Story assumed the premise of Mansfield's judgment that a practice contrary to natural law could not obtain a lawful existence unless it was established by positive legislation. In this case, Story was urged by the defendant's counsel to look to "the law of nations" for guidance in his decision. In an application of *Somerset's* principle to international law, moreover, Story argued that the law of nations rested on "the eternal law of nature" and found its bearings from "the general principles of right and justice." Whatever might be "deduced from the nature of moral obligation" was part of international law unless those moral obligations were "relaxed or waived by the consent of nations." In other words, the judicial consideration with respect to international law and slavery remained the same as it was with respect to domestic slavery: Nothing could be suffered to support it except positive legislation. Story's diatribe against the evils of slavery was all by way of showing that slavery was inconsistent with the "nature of moral obligation" under the "eternal laws of nature" such that it could not be said to be countenanced by international law in the absence of some expressed treaty provision.[120]

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[119] *Le Juene Eugenie* at 845 (Story, J.).
[120] *Ibid*., 846.

As a constitutional matter, Story's argument in *La Jeune Eugenie* was consistent with the teachings of other antislavery American jurists such as James Wilson. The classical understanding of the foundation of American constitutional government was that the people at large grant to the government certain limited and enumerated powers. To use Jefferson's language from the Declaration of Independence, governments derive their just powers from the consent of the governed, and any legitimate exercise of government power ultimately rests on a normative understanding of man's equality under "Nature and Nature's God." For Wilson, this constitutional teaching marked the beginning of an entirely new science of jurisprudence, which rested on an understanding that "States and Government were made for man," and correlatively that a State "derives all its acquired importance" from man's "native dignity."[121] The principles of this new science of jurisprudence challenged the very existence of a system of chattel slavery. As long as slavery was given a legal basis by the slave codes of local municipalities under the Constitution, it was to be judicially tolerated, but, according to Wilson, the presuppositions underpinning the Constitution presented "the pleasing prospect that the rights of mankind will be acknowledged and established throughout the Union."[122]

While England's Constitution rested on the disparate foundation of parliamentary sovereignty, there, too, in conjunction with legislative provisions circumscribing the slave trade, was a development of constitutional claims based on native human dignity. Sir William Grant, in *The Amedie*, reflected:

> The slave trade has . . . been totally abolished in this country, and our legislature has declared, that the African slave trade is contrary to the principles of justice and humanity. Whatever opinion, as private

[121] *Chisholm v. Georgia* (1794) at 455 (Wilson, J.).

[122] Wilson, "Speech at the Pennsylvania Ratifying Convention" in Elliot, *The Debates in the Several State Conventions*, reprinted in *The Founder's Constitution*.

> individuals, we before might have entertained upon the nature of this trade, no court of justice could with propriety have assumed such a position, as the basis of any of its decisions, whilst it was permitted by our own laws. But we do now lay down as a principle, that this is a trade, which cannot, abstractedly speaking, have a legitimate existence. I say, abstractedly speaking, because we cannot legislate for other countries.[123]

Grant reiterated the logic of *Somerset* that a right to ownership of or traffic in another human being is illegitimate when considered in the abstract even though it nevertheless may be sanctioned by positive legislation. Therefore, consistent with this doctrine, a claimant applying for the restoration of "human beings . . . carried unjustly to another country for the purpose of disposing of them as slaves" bore the burden of showing "that by the particular law of his own country he is entitled to carry on this traffic."[124] The burden of proof, now, rested on the slave master, and the judicial presumption was a presumption in favor of liberty.

THE CONSERVATIVE IMPULSE OF THE 1820'S

The logic of the principle posited by Mansfield in the *Somerset* decision had taken such shape by 1824 that Justice Best, writing in *Forbes v. Cochrane and Cockburn*, could assert somewhat uncontroversially that *Somerset* had established "on the high ground of natural right" that "slavery is inconsistent with the English constitution."[125] In the American context, as well, it was generally recognized that slavery was—as Justice Story wrote in *La Jeune Eugenie*—a practice that blunted "the interests of universal justice."[126]

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[123] *The Amedie*, I Acton 240.
[124] *Ibid*.
[125] *Forbes v. Cochrane and Cockburn* (1824), 2 Barnewall & Cresswell 448.
[126] *La Jeune Eugenie* at 850.

It was also telling that the lawyer for the claimants did not attempt to contradict Story's assertion:

> . . . a justification of slavery, or the slave trade, is not intended. I concur entirely in the views of the libellant's counsel on these subjects; and readily acknowledge, that at no time, nor at any occasion, have the noble and honorable sentiments, which spring up in cultivated minds, been more eloquently and ably impressed, than in this case.

But, he went on to admonish, "In deciding new and unprecedented cases, some consideration is due to expediency and convenience . . . By the judgment which the libellants desire to have given, in the present state of the world, the progress of assent to effect abolition may be seriously retarded."[127] The argument put to Justice Story against judicially extending the logic of the principles growing out of the *Somerset* decision was thus an argument of expediency—a desire not to halt the progress of humanity by pouring the new wine of abolition too quickly into the old wineskin of constitutional compromise. Perhaps abstract constitutional principles had advanced in cultivated minds, but the actual constitution of at least one part of society was nevertheless very much committed to preserving the institution of slavery. Indeed, the proper maintenance of constitutional order amid such bifurcated interests was a real consideration, and, if moving the principles of liberty forward too quickly at the judicial level was a serious danger to the constitutional order, given the present state of the world in the early 1820's, then a judicial remedy to the danger of progress was initiated by Chief Justice Marshall's opinion in *The Antelope*.

The case of *The Antelope* involved a pirate ship carrying 280 Africans previously captured from American, Portuguese, and Spanish vessels, which was found off the coast

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[127] *Ibid*., 839.

of the United States and brought into Savannah for adjudication. Portuguese and Spanish claimants initiated the suit under a treaty provision in which the United States agreed to return property rescued from pirates. The United States Attorney General, contra the Spanish and Portuguese, represented the Africans "as having been transported from foreign parts by American citizens, in contravention to the laws of the United States, and as entitled to their freedom by those laws, and by the laws of nations."[128] When oral arguments began before the Supreme Court, Francis Scott Key, the government lawyer appointed to represent the Africans, laid out an argument that had become familiar in similar cases. Key argued that there was a substantive difference between the *onus* required for proving legal ownership of things, on the one hand, and proving legal ownership of men, on the other. "In some particular and excepted cases, depending upon the local law and usage, [men] may be the subjects of property and ownership; but by the law of nature all men are free."[129] In order to legally claim title to the Africans, then, the claimants had to demonstrate more than "mere possession"; that is, they had to "show a law, making such persons property, and that they acquired them under such law."[130] After referencing the opinions in *The Amedie*, *The Fortuna*, *The Donna Marianna*, and *La Jeune Eugenie*, Key asserted that where the determinative law suffered from any ambiguity, "the fair abstract question arises, and their claim may well be repudiated as founded in injustice and illegality."[131] Finally, Key argued that even if some of the Africans were the legal property of the claimants under the laws of the United States, sill, as the Spanish and Portuguese were unable "to identify their own, they are not entitled to

[128] *The Antelope* (1825) at 68.
[129] *Ibid*., 73.
[130] *Ibid*., 74.
[131] *Ibid*., 77.

restitution of any as slaves, since among them may be included some who are entitled to their freedom."[132]

John Berrien, the sitting United States Senator from Georgia who served as the lawyer representing the Spanish and Portuguese claimants, attacked Key's claims by offering a constitutional argument that protected the right to property in a slave as fundamental, denied the existence of universal rights, and denied the competence of a court to consider arguments based on private notions of morality. "For more than twenty years this traffic was protected by your constitution, exempted from the whole force of your legislative power; its fruits yet lay at the foundation of that compact . . . Paradoxical as it may appear," Berrien asserted, the slaves "constitute the very bond of your union."[133] Whatever one's "peculiar notions of morality," a court was to be guided by the law, and, in a reversal of the principle in *Somerset*, Berrien maintained that the slave trade was "not contrary to the positive law of nations; because there is no general compact inhibiting it."[134] Rather than taking a stance *in favorem libertatis*, the legal presumption, according to Berrien, tended in favor of slavery unless the right to slavery was specifically circumscribed by positive legislation.

Of course, the right in question was not construed as a right to slavery as such but rather as a right to property. As Marshall articulated in the opening lines of his opinion, this was a case in which "the sacred rights of liberty and property come in conflict with each other."[135] But in so depicting the point of conflict, Marshall assumed an answer to the very question in controversy; for the argument made on behalf of the Africans was

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[132] *Ibid*., 80-81.
[133] *Ibid*., 86.
[134] *Ibid*., 90.
[135] *Ibid*., 114.

that a human being, by his very nature, was not a legitimate species of property (whereas he was the bearer of rights, including, presumably, the right himself to own property). United States Attorney General William Wirt, arguing along side Key on behalf of the Africans, asserted "that no legitimate right can grow out of a violation" of the principles of "justice and humanity," and, foreshadowing an argument later made by Abraham Lincoln, Wirt summarily declared that it was impossible to "derive a right, founded upon wrong."[136] Under this construction, any alleged conflict between these two rights seemed chimerical at best.

Marshall as well conceded that "every man has a natural right to the fruits of his own labour . . . and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of this admission."[137] Yet by admitting that slavery had no rightful basis in the abstract, the conflict between the two "sacred" rights articulated by Marshall appeared to be a conflict between the universal rights of the slaves, on the one hand, and the conventional rights of the slave owners, on the other. The word *sacred*—with all of its religious connotations—was perhaps not an appropriate adjective for the rights in question; yet there was a manner in which the universal and the particular elements at play conjured sentiments of a religious fervor, and, according to Marshall, any judicial resolution of a case involving these competing claims had to be founded on established custom. "Whatever might be the answer of a moralist to this question," Marshall proclaimed, "a jurist must search for its legal solution, in those principles of action which are sanctioned by the usages, the

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[136] *Ibid*., 112-113. Cf. Abraham Lincoln, "Speech at Quincy," in The Complete Lincoln-Douglas Debates of 1858, ed., Paul Angle, 2nd ed. (Chicago: University of Chicago Press, 1991). Lincoln argued against Douglas ". . . if you admit that [slavery] is wrong, he cannot logically say that anybody has a right to do a wrong" (334).

[137] *Ibid*., 120.

national acts, and general assent, of that portion of the world in which he considers himself as a part, and to whose law the appeal is made."[138]

By making custom the sole standard of international law, moreover, Marshall jettisoned that part of Story's *La Jeune Eugenie* opinion which had argued that custom was determinative only "in things indifferent or questionable" that were not in contravention of "the general principles of right and justice"—unless those principles of right and justice were specifically relaxed by international statute (i.e., by treaty).[139] No one involved in *The Antelope* claimed that the Spanish ought not to be able to reclaim their property under the explicit treaty provision, however. What was central to this case was the question, what types of things legitimately count as property? Under international custom, Marshall declared, slaves were a legitimate species of property because ownership in slaves was not yet universally proscribed. Accordingly, Marshall approved the Circuit Court's decision along with the Circuit Court's remedy, which treated the individual Africans as fungible goods—dividing them up by the proportion claimed by Spain (93/280) while making adjustments for the 114 who had died while in legal custody in Georgia.[140]

James Kent, in his *Commentaries on American Law*, later described the progression from the English slave trade cases in the early nineteenth century to the

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[138] *Ibid*., 121.

[139] *Le Juene Eugenie* at 846.

[140] "Read literally," John Noonan notes, "Marshall's decree approved the lottery." There was, however, sufficient ambiguity in the opinion to require interpretation by the lower courts. A year after its original decision, the Supreme Court then issued a directive clarifying that the slaves would "be designated by proof made to the satisfaction of that court." Under this formula, the lower court eschewed a lottery system and "without discussion of the admissibility of the evidence, without analysis of its ambiguities, without explication of the standard of proof which they were employing . . . held that 39 Africans had been designated by proof to their satisfaction as Spanish property." Noonan, *The Antelope*, 117; 121; 127-128.

American cases heard by Story and Marshall in the 1820's. "In the case of *La Jeune Eugenie*," Kent concluded,

> . . . it was decided in the Circuit Court of the United States, in Massachusetts, after a masterly discussion, that the slave trade was prohibited by universal law. But, subsequently, in the case of the *Antelope*, the Supreme Court of the United States declared that the slave trade had been sanctioned, in modern times, by the laws of all nations who possessed distant colonies; and a trade could not be considered contrary to the law of nations, which had been authorized and protected by the usages and laws of all commercial nations.[141]

The English correlate of the *Antleope* decision had been handed down by Lord Stowell several years previously in a case involving a French vessel captured by a British cruiser off the coast of Africa. Limiting a modifying his own precedent in *The Fortuna* and *The Donna Marianna*, Stowell declared in the case of *Le Louis* (1817) that the law of nations rested on a "legal standard of morality," which was "fixed and evidenced by general and ancient and admitted practice." Still, wishing not to be "misunderstood or misrepresented," Stowell insisted that he was no "professed apologist for this practice [of slavery]." Yet, to "press forward to a great principle by breaking through every other great principle that stands in the way of its establishment . . . in short, to procure an eminent good by means that are unlawful; is as little consonant to private morality as to public justice."[142] As Henry Wheaton later reported, Stowell's decision in *Le Louis* rested on the principle that "no one nation had a right to force the way to the liberation of Africa, by trampling on the independence of other states."[143] Search of foreign vessels in times of peace threatened to strain relations among European nations, and Stowell was

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[141] James Kent, *Commentaries on American Law* (New York: 1826), 1:179-187, in *The Founder's Constitution*, 3: 304-307.

[142] *Le Louis* (1817), 2 Dodson 210 at 249-250.

[143] Wheaton, *Elements of International Law*, 116.

cautious about applying natural principles of justice to foreign citizens in British courts of admiralty.

Beyond the difficult questions of international relations implicated by the regulation of the slave trade, the criminalization of the practice also brought forth novel questions of jurisprudence, directly touching upon the principle laid down in *Somerset*. In a letter to Joseph Story, Stowell reflected on one such case:

> The fact is, I have been, at this late hour of my time, very much engaged in an undertaking perfectly novel to me, and which has occasioned me great trouble and anxiety, and that was the examination of a new question, namely—whether the emancipation of a slave, brought to England, insured a complete emancipation to him upon return to his own country, or whether it only operated as a suspension of slavery in this country, and his original character devolved upon him again, upon his return to his native Island.[144]

A similar scenario had confronted Stowell in a case decided the previous year when Grace, a domestic slave under the laws of Antigua who had nonetheless resided with her master in England for 11 years, was confiscated by customs authorities upon her return to Antigua for having been illegally imported in contravention of the Slave Trade Act of 1807. The claim made on behalf of Grace's freedom was that the laws of England did not protect slavery; that Grace therefore had been divested of her status as a slave when she moved from England; and that as a freeperson she could not be imported into any jurisdiction for the purposes of dealing with her as a slave. The question of this case, again, was essentially whether anything could be suffered to support slavery but positive law, and Grace's lawyers urged the court to consider the principle posited in *Somerset*, in conjunction with the legislative abolition of the slave trade, as protecting Grace's freedom under the laws of England.

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[144] Stowell, Letter to Story (May 17, 1828) in William W. Story, ed., *Life and Letters of Joseph Story*, 571.

As Stowell recognized in his judicial opinion, ". . . this notion of a right to freedom by virtue of a residence in England is universally held out as a matter which is not to be denied."[145] But, Stowell contended, the nature and extent of that freedom was at issue, and it had been established by custom and usage that "residence in England conveys only the character so designated during the time of that residence, and continues no longer than the period of such residence."[146] In other words, the laws of England offered a dispensation of freedom that was temporarily sustained, only because the means of maintaining chatteldom were not "practicable" on the Island, and this understanding was corroborated by the fact that colonial masters actually did bring their slaves with them to England when they travel, and they frequently returned home with the master-slave relationship intact.[147]

In order to maintain this position, Stowell dismissed Mansfield's claim regarding the odious nature of slavery as a mere "*obiter dictum* that fell from that great man." Additionally, rather than undertaking a consideration of those abstract, universal principles asserted by Mansfield, Stowell maintained that "ancient custom is generally recognized as the just foundation of all law" and that those principles undergirding the English claims to liberty were conventional principles that applied only to particular people.[148] "This cry of 'Once free for an hour, free forever!'" Stowell wrote, ". . . is mentioned as a peculiar cry of Englishmen as against those two species of property [i.e.,

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[145] *The Slave Grace* (1827), 2 Haggard 94 at 103-104.

[146] *Ibid*., 103-104.

[147] Stowell observed, "Persons though possessed of independence and affluence acquired in the mother-country, have upon a return to a colony been held and treated as slaves; and the unfortunate descendents of these persons, if born within the colony, have come slaves into the world, and in some instances have suffered all the consequences of real slavery; and the proprietors of these slaves are not called upon to give up to the public all the slaves that they have thus acquired." See *ibid*., 111.

[148] *Ibid*., 107.

villenage and slavery]. It could interest none but the people of this country: and of these only the masters."[149] In conclusion, Stowell declared, "It may be a misfortune that she was a slave"—a sentiment that would have been seconded by Marshall—"but being so, she in the present constitution of society had no right to be treated otherwise."[150]

CONSTITUTIONALISM AMIDST "WHAT IS PASSING IN THE WORLD"

From a comparative perspective, both Marshall's and Stowell's opinions appear to represent a stark limitation on the efficacy of universal principles in constitutional adjudication. Neither opinion, for example, denied the validity of the principle cited by Marshall that "every man has a natural right to the fruits of his own labour." Nor did they deny that such a principle applied universally, and Stowell went so far as to declare himself a "friend of abolition generally." While the substance of Stowell's opinion would seem markedly inconsistent with such rhetoric, a conservative decision in such a novel case is perhaps consistent with some of the principles undergirding the English Constitution, particularly the principle of Parliamentary sovereignty and the high regard for English custom. Indeed, Stowell's opinion in *The Slave Grace* was soon rendered irrelevant by the 1833 Parliamentary act abolishing slavery throughout the British Empire. However, the judicial remedy seemingly approved by Marshall—a simple lottery system—was particularly inconsistent with the logic of American constitutionalism and the American constitutional emphasis on, as Wilson put it, "the prime rank of man in human affairs." That two similar cases limiting the applicability of universal principles—

[149] *Ibid*., 115.
[150] *Ibid*., 100.

after a series of cases tending in the opposite direction—would emerge in different constitutional contexts also reinforces the notion that there are important extra-constitutional factors involved in the construction and application of legal rules and principles. Nevertheless, the articulation of constitutional principles at the judicial level plays a formative role in constitutional maintenance and constitutional change, and considerations of this sort led Stowell and Marshall to render decisions tending toward the maintenance of a tension implicit in a fragile constitutional order.

In his argument before Marshall in *The Antelope*, Attorney General Wirt urged the Court not to "shut their eyes to what is passing in the world," and he asserted that the "Africans stand before the Court as if brought up before it upon a habeas corpus."[151] In so doing, Wirt brought the logic of Anglo-American constitutionalism full circle by drawing upon the principles behind *habeas corpus* review. If the Africans were able to "stand before the Court as if brought up . . . upon a habeas corpus," the only reason was because judicial protection from arbitrary force was a protection that ought not to have depended on one's status as an Englishman or an American but simply on one's status as a man. What evidence, then, should have been required to prove that a man was held by the law of the land and not by mere arbitrary force? As Key took up this argument, he suggested that it surely was not "mere possession" that made one's claim over another rightful. For other goods and chattels, he conceded, mere possession may have been all that was required to demonstrate ownership, "[b]ut these are men . . . and by the law of nature all men are free."[152] In so linking the plight of the Africans with the logic of Anglo-American constitutionalism, Wirt and Key sought constitutional recognition of the

[151] *The Antelope*, 110 and 108.
[152] *Ibid*., 73.

principles at work in "the great moral and legal revolution which is now going on in the world."[153]

Such a revolution, however, was not the only thing going on in the world. The Americans were undergoing a heated domestic debate over the institution of slavery, and there was much anxiety about its final resolution. The opposing factions had been quieted, for a moment, by Henry Clay's Missouri Compromise, but Thomas Jefferson acknowledged the residual tension in the bi-sectional arrangement when he wrote,

> This momentous question, like a fire bell in the night, awakened and filled me with terror. I considered it at once as the knell of the Union . . . A geographical line, coinciding with a marked principle, moral and political, once conceived and held up to the angry passions of men, will never be obliterated; and every new irritation will mark it deeper and deeper[154]

The Missouri Compromise held together a tenuous union of desultory commitments within a larger constitutional order, and from one perspective, "any cause which focused feelings on the rights of slaves could be seen as inflammatory."[155]

Moreover, the cause in the world that particularly focused feelings on the rights of slaves was legislation passed in America and England that heightened penalties for slave trading and declared the slave trade itself to be piracy—a crime that carried with it a sentence of death. The 1820's was also the era of the Monroe Doctrine, and any case dealing with the slave trade involved "difficult issues of visitation and search of foreign vessels in time of peace."[156] On the English side, antislavery legislators had turned their attention to the abolition of slavery in the English colonies, and there were powerful factions and vested interests opposing any such move. It is within these contexts, that the

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[153] *Ibid*., 75.

[154] Letter from Thomas Jefferson to John Holmes (22 April 1820) in Library of Congress, http://www.loc.gov/exhibits/jefferson/159.html (accessed 14 October 2008).

[155] Noonan, *The Antelope*, 76.

[156] Robert Cover, *Justice Accused* (New Haven: Yale University Press, 1975), 103.

decisions in *The Antelope* and *The Slave Grace* emerge not as manifestations of illiberal constitutional theories—valuing or defending slavery for its own sake—but as conservative judicial attempts to preserve increasingly weakened constitutional orders.

In a letter to Joseph Story, which was written as a sort of apology for his opinion in *The Slave Grace*, Lord Stowell explained that English politics were "in a very uncomfortable state, our revenue deficient, our people discontented, and a strong spirit of insubordination prevailing in the country, and the sense of religious obligation very much diminished."[157] While Stowell proclaimed himself to be a "friend of abolition generally," he emphasized practical considerations in effecting abolition. The principles behind the argument that would have Grace declared free, Stowell worried, might have induced other slaves

> . . . to try the success of various combinations to procure a conveyance to England for such purpose; and, by returning to the colony in their newly acquired state of freedom, if permitted, might establish a numerous population of free persons, not only extremely burdensome to the colony, but, from their sudden transition from slavery to freedom, highly dangerous to its peace and security.[158]

As Stowell rightly recognized, the logic of a Court's opinion—whatever that opinion may be—will rest on principles that ultimately travel far beyond the particular case at hand.

While these decisions in some sense demonstrate the limitations of abstract constitutional principles in overcoming concrete, practical considerations, they also demonstrate the importance of the ways in which interpreters construct those very constitutional principles. In his response to Berrien's accusation that slavery was at the very foundation of the American Constitution, Key asserted,

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[157] Letter from Stowell to Story (17 May 1828) in Story, *Life and Letters of Joseph Story*, 571.
[158] *The Slave Grace*, 116.

> Free America did not introduce it. She led the way in measures for prohibiting the slave trade. The revolution which made us an independent nation, found slavery existing among us. It is a calamity entailed upon us, by the commercial policy of the parent country. There is no nation which has a right to reproach us with the supposed inconsistency of our endeavoring to extirpate the slave trade as carried on between Africa and America, whilst at the same time we are compelled to tolerate the existence of domestic slavery under our own municipal laws.[159]

America's relationship with slavery was more convoluted than Key admitted, but by recognizing competing forces within the American constitutional tradition, Key was able to emphasize those constitutional principles working against the slave interest.

While it may have been ill-conceived for a nineteenth-century jurist to let the heavens fall for the sake of justice, judges did serve as guardians and tutors in the constitutional order, and, insomuch as those principles working against the slave interest coincided with the fundamental principles of Anglo-American constitutional thought, a judicial posture tending toward the establishment and preservation of universal liberty was necessary for the maintenance of that particular constitutional heritage which finds its expression in the rule of law. As the conservative decisions in the 1820's confirm, however, there was a deep tension, first noted by Mansfield, between the universal principle of liberty and the institution of slavery, and this tension emerged after the 1820's with a more nuanced character. The election of Andrew Jackson in 1828 precipitated the increased democratization of American institutions while, perhaps paradoxically, an invigorated and unashamedly pro-slavery constitutionalism gained prominence on the national scene. The ranks of northern abolitionists grew, as well, as William Garrison and other antislavery activists expounded pro-slavery interpretations of the American Constitution, which they summarily denounced as "the most bloody and

[159] *The Antelope*, 112.

heaven-daring arrangement ever made by men for the continuance and protection of a system of the most atrocious villany ever exhibited on earth."[160]

Within this milieu, we turn in the next chapter to John Quincy Adams—that "Favored Son of the Revolution"—who emerged as an ideological defender of the antislavery constitutional tradition during his post-presidential career in the United States House of Representatives. In a case remarkably similar to *The Antelope*, Adams then was called upon in 1841 to serve as counsel for a group of Africans who had come under the protection of the federal court system. Critically engaging John Marshall's *Antelope* opinion, Adams laid out in his celebrated *Amistad* argument a theory of constitutional disharmony that pitted "fact against right" while nonetheless maintaining an antislavery reading of the American Constitution. In Adams's struggle to introduce greater harmony between the principles undergirding American constitutionalism and the actual practices of American institutions, one can see, moreover, both the influence of the natural law framework bequeathed by the English common law and the seeds of the antislavery arguments that would be taken up and defended, a generation later, by Abraham Lincoln and the burgeoning Republican Party.[161]

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[160] William Garrison, "On the Constitution and the Union," *Liberator*, December 29, 1832.

[161] See David Brion Davis, *Inhuman Bondage: The Rise and Fall of Slavery in the New World* (Oxford: Oxford University Press, 2006). Davis comments on Adams's *Amistad* argument, "Certainly anyone who reads the full text of Adams's powerful indictment of slavery can understand why he became in all likelihood the statesman who passed on to Abraham Lincoln, via Charles Sumner, the conviction that a president, as commander in chief during war or civil war, had the power to emancipate America's slaves" (26). Adams's first made the argument that the constitutional war power extended to slavery in a speech in the House of Representatives on 25 May 1836. See *Congressional Globe*, House of Representatives, 24th Congress, 1st Session, pp. 447-450. Beyond the war power argument, Adams's influence on Lincoln is seen also in Adams's emphasis on the Declaration of Independence and in his natural law reading of the Constitution.

Chapter 3: Fact against Right

In Jacksonian America, the debate over the relationship between slavery and American constitutionalism grew particularly divisive, and the floor of the United States House of Representatives emerged as one of the principal fronts in this rhetorical battle. Beginning in 1836, House Democrats employed a procedural "gag rule" against the presentation of antislavery petitions, which often agitated for the abolition of slavery in the District of Columbia. As William Freehling notes, the conflict and crisis that ensued, albeit bloodless, was the "Pearl Harbor" of the controversy that eventually culminated in the Civil War.[162] During this epoch, John Quincy Adams took a leading role in arguing against the congressional gag rule, and, in the process, developed and refined several arguments concerning the theoretical foundations of American constitutionalism and the price of neglecting or discarding those foundations.[163] Adams's arguments—emphasizing the disparity between natural law and positive law and hailing the self-evident truths in the Declaration of Independence as fundamental to the American regime—constitute a link in the chain from the *Somerset* case through the antislavery arguments of some of the principal American Founders and on to the antebellum Republican Party.

When Adams was asked in 1841 to provide legal representation for a group of Africans who had been found aboard the slaving ship "La Amistad," the Massachusetts Congressman then had the opportunity to articulate and summarize his antislavery

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[162] William W. Freehling, *The Road to Disunion: Secessionists at Bay, 1776-1854* (New York: Oxford University Press, 1991), 308.

[163] For a historical overview of John Quincy Adams's role in the fight against the congressional gag rule, see William Lee Miller, *Arguing About Slavery: The Great Battle in the United States Congress* (New York: Alfred Knopf:, 1996).

arguments against the backdrop of John Marshall's *Antelope* opinion.[164] Chief Justice John Marshall, it will be recalled, had declared in his opinion for *The Antelope* (1825) that slavery's repugnance to the law of nature was "*scarcely* to be denied. That every man has a natural right to the fruits of his own labor," Marshall continued, "is generally *admitted*; and that no other person can rightfully deprive him of those fruits, and appropriate them against his will *seems* to be the necessary result of this admission."[165] Sixteen years later, during his oral argument before the Supreme Court in the case of *La Amistad* (1841), John Quincy Adams reflected on this aspect of Marshall's opinion:

> Surely never was this exclamation more suitable than on this occasion; but the cautious and wary manner of stating the moral principle, proclaimed in the Declaration of Independence, as a *self-evident truth*, is because the argument is obliged to encounter it with matter of fact. To the moral principle the Chief Justice opposes general usage—*fact against right*.[166]

Adams's summary of the *Antelope* opinion thus highlighted a tension between the existential fact of slavery and the natural right to liberty, a tension implicit in what historian David Brion Davis describes as the "irreconcilable contradictions between American slavery and the principles of America's Revolutionary heritage."[167]

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[164] *La Amistad* (1841), 40 U.S. 518. During a voyage from Havana to Puerto Príncipe, Cuba, African captives on board the slave ship *La Amistad* freed themselves, killed the captain of the ship, and held two members of the crew hostage. The ship was later found off the coast of New York by a U.S. brig and brought into U.S. district court for adjudication. Spanish claimants libeled the court for return of the Africans as slave property under the same treaty provision that was operative in *The Antelope*. In contrast to *The Antelope*, however, the slave trade was illegal according to Spanish law when the Africans were taken captive. Joseph Story declared for the majority of the Court that the Africans were entitled to their freedom both by the laws of Spain and by the "eternal principles of justice." For a history of the case, see Howard Jones, *Mutiny on the Amistad: The Saga of a Slave Revolt and its Impact on American Abolition, Law, and Diplomacy* (New York: Oxford University Press, 1987).

[165] *The Antelope* (1825), 23 U.S. 66

[166] John Quincy Adams, *Argument of John Quincy Adams, Before the Supreme Court of the United States, in the case of the United States, Appellants, vs. Cinque, and others, Africans, Captured in the Schooner Amistad . . .* (New York: S.W. Benedict, 1841), 117.

[167] David Brion Davis, *Inhuman Bondage* (Oxford: Oxford University Press, 2006), 22.

Such irreconcilable contradictions were part of the very constitutional fabric woven by the Founders. The "bargain between freedom and slavery contained in the Constitution of the United States," Adams had written some twenty years earlier,

> . . . is morally and politically vicious, inconsistent with the principles upon which alone our Revolution can be justified; cruel and oppressive, by riveting the chains of slavery, by pledging the faith of freedom to maintain and perpetuate the tyranny of the master; and grossly unequal and impolitic, by admitting that slaves are at once enemies to be kept in subjection, property to be secured or restored to their owners, and persons not to be represented themselves, but for whom their masters are privileged with double share of representation.[168]

Yet, while granting that America's fundamental law contained this "bargain between freedom and slavery," Adams insisted that the principles undergirding American constitutionalism were fundamentally inconsistent with the rights of mastery or conquest. There were, however, obvious difficulties attending such an antislavery constitutional interpretation, including the task of delineating those constitutional principles inconsistent with a system of chattel slavery that enjoyed continued legal protection in many of the American states after 1776 and was protected, and even bolstered, in various ways by the Constitution of 1789.

Much of the literature on slavery and American political development seeks to explain why this institution of slavery endured in a purportedly liberal constitutional regime, founded, as it were, on the inalienable rights of man. One possible explanation is that slavery was anomalous to the principles undergirding American constitutionalism and that the continued existence of slavery reflected a conflict between the high ideals of the American Revolution and the baser instincts, impulses, and habits that often informed

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[168] *Memoirs of John Quincy Adams Comprising Portions of His Diary From 1795 to 1848*, Vol. V, 3 March 1820, ed. Charles Francis Adams (Philadelphia: J.B. Lippincott & Co., 1875), 11.

decision making on the ground. Accordingly, Gunnar Myrdal famously described the America dilemma

> *. . . as ever-raging conflict between, on the one hand, the valuations preserved on the general plane which we shall call the 'American Creed,' where the American thinks, talks, and acts under the influence of high national and Christian precepts, and, on the other hand, the valuations on specific planes of individual and group living, where personal and local interests; economic, social, and sexual jealousies; considerations of community prestige and conformity; group prejudice against particular persons or types of people; and all sorts of miscellaneous wants, impulses, and habits dominate his outlook*.[169]

In Myrdal's account, the principles undergirding slavery (and racial separatism in the wake of slavery) were contrary to the ideals of the American Creed, which garnered widespread support in American society.

Louis Hartz similarly argued that America was, and had always been, predominantly liberal, owing much to the widespread influence of the political philosophy of John Locke. The only true philosophical challenge to the predominance of Lockean liberalism came in the form of the positive good defense of slavery in the ante-bellum South, which Hartz marginalized as the "reactionary enlightenment" of an "alien child in a liberal family."[170] In both Myrdal's and Hartz's accounts, the principles of the American Creed—succinctly summarized by Samuel Huntington as "liberal, individualistic, democratic, egalitarian"[171]—have been in conflict with "other valuations" that are couched in terms of "tradition, expediency, or utility."[172] According to Huntington, this tension between "American political ideals and American political

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[169] Gunnar Myrdal, *The American Dilemma: The Negro Problem and Modern Democracy* (New Brunswick, N.J.: Transaction Publishers, 1996), lxxix. Italics in the original.

[170] Louis Hartz, *The Liberal Tradition in America,* 2nd Edition (Hartcourt, 1991), 8.

[171] Samuel Huntington, *American Politics: The Promise of Disharmony* (Cambridge: Harvard University Press, 1981), 4.

[172] Myrdal, *The American Dilemma*, lxxxi.

institutions and practice" has engendered an "inherent disharmony, at times latent, at times manifest, in American society," and the attempt by reformers to introduce greater harmony between ideals and institutions has been a predominant driving force in American political development.[173]

Another possible explanation for the coexistance of slavery and liberalism, much different from the anomaly thesis proposed in different ways by Myrdal, Hartz, and Huntington, is that "American society as we know it exists only because of its foundation in racially based slavery, and it thrives only because racial discrimination continues." Summarizing this interpretation, Jennifer Hochschild writes that the "apparent anomaly is an actual symbiosis."[174] Edmund Morgan prominently put forward a similar thesis in his study of slavery in eighteenth-century Virginia. What made freedom and equality among the Virginian elite possible, according to Morgan, was the relative equality of leisure and economic resources provided by a system of racially-based chattel slavery. Liberal ideology among whites flourished, in other words, precisely because slavery was endemic to the system.

Scholars associated with the school of Critical Race Theory have offered similar observations. In his reinterpretation of liberal social contract theory, Charles Mills suggests that the metaphor of a racial contract, rather than a contract among colorless atomistic individuals (as featured in the theories of modern liberal theorists such as John Rawls and Robert Nozick), more accurately accounts for the history of racial

[173] Huntington, *American Politics*, 4; 12.
[174] Jennifer Hochschild, *The New American Dilemma: School Desegregation and Liberal Democracy*, 5.

subordination in Western political practice.[175] While maintaining that "liberalism is the dominant outlook of the modern age," Mills nonetheless asserts that liberalism itself has consisted of an "agreement among white contactors to subordinate and exploit non-white noncontractors for white benefit."[176] As an exercise in criticism, Mills's work seeks to excavate or deconstruct the liberal social contract to uncover its inherent racial basis. After such an exercise, Mills suggests, the "biasing of liberal abstractions by the concrete interests of the privileged (here, whites) then becomes apparent."[177]

Against the liberal thesis and the symbiosis thesis, Rogers Smith has suggested that American political development is best interpreted as a competition between multiple political traditions; some liberal, some illiberal. Rather than portraying "American political development as the working out of liberal democratic or republican principles," Smith emphasizes the influence of multiple political traditions, including traditions rooted in inegalitarian ascriptive hierarchies. The insights of Smith's thesis have generally been acknowledged, and scholars such as Huntington have conceded that the liberal American Creed has, in fact, been in competition with other illiberal traditions.[178] Within the context of slavery, Mark Graber recently offered a revisionist interpretation of the Supreme Court's notorious *Dred Scott* decision (discussed also in chapters 1, 4, and 5), and he argued that "racist and other ascriptive ideologies are as rooted in the

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[175] Charles W. Mills, *The Racial Contract* (Ithaca, NY: Cornell University Press, 1997). Cf. John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press, 1971) and Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974).

[176] Charles W. Mills, "Racial Liberalism," *Publications of the Modern Language Association of America*, Vol. 123, Issue 5 (October 2008), 1381.

[177] Mills, "Racial Liberalism, 1388.

[178] Samuel Huntington, *Who Are We? The Challenges to America's National Identity* (New York: Simon & Schuster, 2004), 49: "The Creed has thus been one element of American identity since the Revolution. But as Rogers Smith says, the argument that American identity is defined only by the Creed 'is at best a half-truth.' For much of their history, Americans enslaved and then segregated blacks, massacred and marginalized Indians, excluded Asians, discriminated against Catholics, and obstructed immigration by people from outside north-western Europe . . . American identity has thus had several components."

American political tradition as liberal, democratic, and republican ideals."[179] Conflict over slavery, accordingly, was not a conflict between ideals and institutions so much as it was a conflict between competing ideals. "Policies preserving racial hegemony" Graber contends, "were means to valued ends, not temporary expedients."[180]

Each of these paradigms (i.e., anomaly, symbiosis, multiple traditions) has strengths and weaknesses in explaining the seemingly paradoxical existence of slavery in a purportedly liberal democratic society. The general weakness of these paradigms inheres in the limitations of broadly labeling each of the multiple political traditions, or one dominant political tradition, as any one thing in particular. The reasons for considering slavery to be just or unjust from a legal and/or a moral point of view have numerous permutations and any one argument is not easily categorized except in extremely broad terms. As Alasdair MacIntyre notes, moreover, what many Americans are educated into—and this would be as true of the nineteenth-century as it is of the twenty-first—

> . . . is not a coherent way of thinking and judging, but one constructed out of an amalgam of social and cultural fragments inherited from different traditions from which our culture was originally derived (Puritan, Catholic, Jew) and from different stages in and aspects of the development of modernity (the French Enlightenment, the Scottish Enlightenment, nineteenth-century economic liberalism, twentieth-century political liberalism).[181]

By focusing on particular historical actors in the midst of this convoluted political culture, we are better able to tease out some of the intellectual influences, ideas, and

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[179] Mark Graber, *Dred Scott and the Problem of Constitutional Evil* (New York: Cambridge University Press, 2006), 77.

[180] *Ibid*., 77.

[181] Alasdair MacIntyre, *Whose Justice? Which Rationality?*(South Bend: Notre Dame University Press, 1988), 2.

reasons that were given for supporting or opposing slavery in concrete historical situations.

In this chapter, I narrow the scope of my inquiry to center on John Quincy Adams's constitutional arguments in the case of the *Amistad*. What emerges, I suggest, is both a supplement and a challenge to various aspects of the existing literature on American political development. Adams's constitutional interpretation accounts for competing traditions within the constitutional order while nonetheless maintaining the primacy of certain constitutional principles in an environment of ideological diversity and contestation. When applied to the individual, Adams's interpretation also accounts for the incoherent amalgamation of ideas under which individual actors operate. One of the challenges to both the multiple traditions and symbiosis theses is a challenge concerning the normative basis of critique. Smith is clear that he does not think liberal democratic ideals can be supported based on reasoning from foundational concepts such as nature, history, or God.[182] Critical race theorists such as Mills, as well, are ambivalent about the normative basis of their critique of a racialized liberalism. Adams, however, reasoned from foundational concepts in interpreting the Constitution, and, rather than impugning liberal ideals because they have been used to justify slavery, he argued that the liberal defense of slavery was a perversion of those very ideals.

A study of Adams's constitutional thought also offers a challenge to contemporary Tocquevillian narratives of unimpeded liberal development in American history. Insomuch as scholars such Myrdal and Hartz overemphasized the linear progression of liberal ideals, they did not adequately take account of the degree to which the meaning of

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[182] Rogers Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven: Yale University Press, 1997), 489.

those ideals was constantly contested and their legitimacy both attacked and defended. A close analysis of Adams's constitutional thought offers a way of viewing the ubiquitous tension between liberal ideals and slavery that makes sense of each of the insights of these various paradigms while also offering a solid normative foundation for favoring liberal ideals over and against other competing elements in American political culture. From a theoretical perspective, Adams insisted that some normative constitutional principles, antislavery in their fullest implications, were fundamental to American constitutionalism even while recognizing the extent to which those principles have been betrayed, muted, and denied.

CONSTITUTIONAL DISHARMONY

Central to Adams's interpretation of American constitutionalism was the conflict between "fact and right" that he perceived at work in John Marshall's *Antelope* opinion. That is to say, there was a conflict between normative constitutional principles and existential realities—a constitutional *disharmony*—that complicated and constrained constitutional politics.[183] In what may be garnered from his speeches and writings, Adams's thought regarding the character of this disharmony was nuanced. On one level, there was a disharmony internal to the constitutional text itself, inherent in the "bargain between freedom and slavery" made by constitutional framers. On another level, there was an historically contingent disharmony between the natural law principles invoked by

[183] For similar discussions of the problem of constitutional disharmony, see Gary J. Jacobsohn, "The Disharmonic Constitution," presented at the Limits of Democracy Conference, Princeton, 2008; Gary Jacobsohn, *The Disharmonic Constitution* (Harvard University Press, Forthcoming).

American revolutionaries and subsequent political practice.[184] Still on another level there was a philosophical conundrum arising from the attempt to regard and treat men as property. While the first two aspects of American constitutional disharmony were rooted in historical development (i.e., inconsistencies in the constitutional text itself or inconsistencies between political rhetoric and political action), the philosophical problem, for Adams, had as its referent a trans-historical basis of right against which the historical practice of slavery was thought to be antithetical.[185]

A harmonization of the discordant elements in the constitutional text could have been accomplished either through the abolition of slavery or through the abandonment or reinterpretation of those principles seemingly inconsistent with slavery. Similarly, the inconsistency between the natural law principles invoked by the revolutionaries and the institution of slavery could have been reconciled either through the logical extension of liberty to slaves or through a reinterpretation of those principles of liberty that limited them to certain segments of humanity. The late Southern strategy generally seems to be of the latter variety, exemplified by the rise of the positive good defense of slavery and the Confederate Constitution's guarantee that no "law denying or impairing the right to negro slaves shall be passed."[186]

While Adams did painstakingly argue that the defense of slavery as a positive good and a constitutional right was a radical departure from the theoretical foundations of

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[184] This second type of disharmony between professed ideals and actual practice is explored at some length in Samuel Huntington, *American Politics: The Promise of Disharmony* (Cambridge: Harvard University Press, 1981).

[185] Slavery posed a philosophical problem because men were thought to be an illegitimate species of property even when they were treated as such by the law of the state. The appeal, in other words, was beyond the law of the state to a trans-historical moral law, rooted in human nature. For a debate concerning the influence of nature and history as foundational concepts in American political development, see James W. Ceaser, Jack N. Rakove, Nancy L. Rosenblum, and Rogers M. Smith, *Nature and History in American Political Development: A Debate* (Cambridge: Harvard University Press, 2006).

[186] *Constitution of the Confederate States of America* (1861), Sec. 9§4.

American politics, his primary argument against slavery in the *Amistad* case was based on a standard transcending American history. A man who claimed another man as his property, Adams insisted, had, from the moral basis of human nature, claimed a "thing that is not."[187] But even this distinction between nature and history was convoluted insomuch as Adams treated the Declaration's natural law principles as true while treating the Declaration itself as a constitutive document of the American regime relevant to constitutional adjudication. In other words, principles of natural law and natural rights, according to Adams, had a metaphysical basis in reality while also having an historical basis in America's founding documents.[188]

The core political problem attending American constitutional disharmony arose from the existential and systematic denial of natural rights through the perpetuation of institutionalized slavery and the perverted enlistment of the ideals of liberty and equality in support of that institution. But slavery was perceived *as a problem* only insomuch as it was measured against the fundamental political teaching of the Declaration of Independence—that all men are created equal and endowed by their Creator with certain inalienable rights. As Davis argues, the primary problem of slavery arose not from an historical incongruence between professed ideals and actual practice but rather from the

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[187] Adams, *Amistad Argument*, 12.

[188] In his study of the Declaration of Independence, the historian Carl Becker famously asserted that "To ask whether the natural rights philosophy of the Declaration is true or false is essentially a meaningless question." For political participants who appeal away from the law of the state to a transcendent law or principle, Becker contended, the higher law "is 'true' because it brings their actions into harmony with a rightly ordered universe, and enables them to think of themselves as having chosen the nobler part, as having withdrawn from a corrupt world in order to serve God or Humanity or a force for the highest good." See Carl Becker, *The Declaration of Independence* (New York: Harcourt, Brace, and Co., 1922), 277-288. The assertion that it is essentially meaningless to ask whether the appeal to a higher law actually did bring the participants' actions more in line with a rightly ordered universe is an assertion with which Adams would have vigorously disagreed.

"irreducible human dignity of the slave."[189] And the problem of reconciling slavery and human dignity became, in Adams's view, a multidimensional problem, creating a disharmony between existential and normative realities both within the larger constitutional order and within the heart of each individual master.

Greg Russell observes that Adams's anthropology began with a fundamental contradiction where there was "on the one hand, man's aspiration to the law of love as the true essence of *humanitas* and, on the other hand, the tragedy of his consistent betrayal of that law."[190] Similarly, Adams's constitutional interpretation began with the discord between the polity's aspiration to the natural law principles invoked by the Declaration of Independence and the polity's consistent and tragic betrayal of those principles. At once a link to the founding generation and an intellectual precursor to later antislavery constitutional thought, Adams's reflections on American constitutionalism offer a unique perspective on the perplexing coexistence of liberalism and slavery in antebellum America. As a political actor—Ambassador, Secretary of State, President, Congressman, and finally legal counsel at the bar of the Supreme Court—Adams also operated within specific historical and political contexts, and he often commented on the disparity between constitutional principle and political practice.[191] At the heart of Adams's concept of constitutional disharmony, moreover, was the inherent disharmony of human nature.

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[189] Davis, *Inhuman Bondage*, 35.

[190] Greg Russell, *John Quincy Adams and the Public Virtues of Diplomacy* (Columbia, MO: University of Missouri Press, 1995), 78-79.

[191] Some of these political contexts, involving international and domestic politics, are described in Michael Daly Hawkins, "John Quincy Adams and the Antebellum Maritime Slave Trade: The Politics of Slavery and the Slavery of Politics," 25 *Oklahoma City University Law Review* 1 (2000).

PERVERTED SENTIMENT AND THE DISHARMONY OF HUMAN NATURE

In the home of John and Abigail Adams, John Quincy enjoyed a classical education, and early in life he grappled with competing Greek and Roman views of human nature. Rather than being nourished by the classics, however, Adams's emphasis on the fundamental condition of human nature as essentially fallen emerged from within the biblical orbit. As Russell explains, Adams

> . . . thought that Greek and Roman perspectives on human nature overly accentuated the uniqueness of man's rational faculties (*nous*). The Bible said nothing of a good mind and evil body; the dualism of the classical philosophers identifies the body with evil and assumes the essential goodness of mind or spirit.[192]

In the biblical view, however, man suffered from a certain defect of mind and will as well as body. Man's condition thus could not be rectified merely by rightly ordering reason over passion through education, for reason itself was suspect. "Warned of the imperfections of my own reason," Adams confided to his diary,

> I discount its conclusions, as I do those of others; and when I consider what man is, whence he comes, and where he goes, physically, I wonder only *at the degree* in which he does possess the power of linking cause and effect . . . .[193]

Adams's relative pessimism concerning man's rational faculties was, however, tempered by his equally firm insistence that the common inheritance of mankind was a knowledge of the natural law. Man saw dimly, but he was not blind. Thus, at the center of man was a certain paradox inherent in his very nature. "What I would, that I do not," St. Paul had written, in a scriptural passage familiar to Adams. "But what I hate, that I do."[194]

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[192] Greg Russell, *John Quincy Adams and the Public Virtues of Diplomacy*, 79-80.
[193] *Memoirs of John Quincy Adams*, Vol. VIII, 19 April 1829, 140.
[194] Romans VII:XV.

Imperfect knowledge and imperfect will combined to create an internal disharmony, a division in the heart of man.

Alluding to the same Pauline epistle in his *Amistad* argument, within a discussion of the wrong of arbitrary detention, Adams assured members of the Supreme Court, "I will not recur to the Declaration of Independence—your honors have it implanted in your hearts."[195] The natural law was, according to Adams, known to all, and while susceptible to perversion in the minds of men by the influences of carnal passions or self-interested rationalizations, it could not be completely obfuscated. Conflicting visions of right, therefore, did not simply represent a Manichean struggle between two mutually exclusive principles or subjective passions. Rather, in the Augustinian theology of Adams's Puritan New England, evil was always a perversion of good that retained some element of its original goodness. "Good may exist on its own," Augustine asserted, "but evil cannot."[196] Similarly, Adams described the theoretical defense of slavery as something that was parasitic on true principles.

Adams's dual affirmation of a) man's knowledge of the natural law and b) the defect in man's mind and will in understanding and obeying that law in its particulars is relevant to the theory of constitutional disharmony both directly and by way of analogy. In *Dred Scott and the Problem of Constitutional Evil*, Mark Graber describes as "silly" the "proposition that Southerners fought to the death to preserve what they knew in their hearts was a necessary evil."[197] This precisely is what Adams suggested, however, when he wrote that in the South the slavery question was "a perpetual agony of conscious guilt and terror attempting to disguise itself under sophistical argumentation and braggart

[195] Adams, *Amistad Argument*, 16. Cf. Romans II:XV.
[196] Augustine, *The City of God*, Book VIII: Ch. III.
[197] Graber, *Dred Scott and the Problem of Constitutional Evil*, 83.

menaces."[198] In other words, the defense of slavery in the abstract required a suppression of moral knowledge and a prevarication of conscience. In a similar vein, Adams insisted that the defense of slavery as a positive good stemmed from a "perverted sentiment" that tainted "the very sources of moral principle."[199]

Reflecting on a conversation with John Calhoun during the crisis leading to the Missouri Compromise in 1820, Adams wrote:

> . . . [he] said that the [egalitarian] principles which I avowed were just and noble; but that in the Southern country, whenever they were mentioned, they were always understood as applying to white men.

Calhoun then went on to insist that black slavery

> . . . was the best guarantee to equality among the whites. It produced an unvarying level among them. It not only did not excite, but did not even admit of inequalities, by which one white man could domineer over another. [200]

By clinging to the idea of equality while denying its necessary theoretical foundation in the laws of nature and nature's God, Adams suggested, Calhoun's theory of white equality reflected a perversion of the principle of equality proclaimed in the Declaration. As such, the defense of black slavery as a prerequisite to the freedom and equality of white society was a manifestation of a disorder in the American liberal tradition rather than a self-standing rival to it.

Calhoun's argument in defense of slavery, Adams reflected,

> . . . establishes false estimates of virtue and vice; for what can be more false and heartless than this doctrine which makes the first and holiest rights of humanity to depend upon the color of the skin? It perverts human reason, and reduces man endowed with logical powers to maintain that slavery is sanctioned by the Christian religion, that slaves are happy and contented in their

[198] *Memoirs of John Quincy Adams* (19 April 1837), 9:349.
[199] *Ibid*. (3 March 1820), 5:10-11.
[200] *Ibid*. (3 March 1820), 5:10.

> condition, that between master and slave there are ties of mutual attachment and affection, that the virtues of the master are refined and exalted by the degradation of the slave; while at the same time they vent execrations upon the slave-trade, curse Britain for having given them slaves, burn at the stake negroes convicted of crimes for the terror of the example, and writhe in agonies over fear at the mention of human rights as applicable to men of color.[201]

According to Adams, the tradition of slavery—if that is what it is to be called—remained aberrational to the founding principles of the American regime even at those times, such as during the Jacksonian era, when "the democracy of the country [was] supported chiefly, if not entirely, by slavery."[202] In other words, the normative principles that informed the very logic of American constitutionalism were in tension with certain existential realities. In the face of such constitutional disharmony, moreover, Adams argued that the task of the statesman was to bring constitutional practice in line with constitutional principle, and this duty precisely was the ground upon which rested his argument against Marshall's deference to custom or usage in the *Antelope* opinion.

THE ANTELOPE AND *LA AMISTAD*

Though Marshall did concede in *The Antelope* that slavery was contrary to the law of nature, he nonetheless maintained that the case was to be decided by "those principles of action which are sanctioned by the usages, the national acts, and general assent, of that portion of the world in which he considers himself as a part, and to whose law the appeal is made." The Chief Justice further argued that the legal foundation of

[201] *Ibid*. (3 March 1820), 5:11.
[202] *Ibid*. (18 August 1835), 9:255.

slavery had long been established by the international law of war. The right of the victor to enslave the vanquished was at one time recognized by all civilized nations as a "legitimate use of force, [and] the state of things which is thus produced by general assent cannot be pronounced unlawful." While there had been a growing trend among Western nations to criminalize the slave trade through domestic legislation and bilateral treaties, the trade was carried on legally according to the laws of Spain when the *Antelope* was captured, and the Chief Justice was reluctant to declare an action sanctioned by the laws of another nation to be contrary to international law. "Whatever might be the answer of a moralist to this question," Marshall asserted that as a jurist he was bound "by the path of duty" to deliver the slaves to their Spanish claimants.[203]

In his *Amistad* argument, Adams insisted that the fallacy in Marshall's opinion was his recognition of the right of slavery as founded on the right of conquest. In order to hold this position, Marshall had either to maintain that slavery was a morally legitimate consequence of war or, recognizing slavery's moral illegitimacy, he had to insist that the Court ought nevertheless to recognize a legal right that contradicts moral right. The English judge Lord Stowell had put forth the latter argument in *Le Louis* (1817), holding that a jurist must be guided by a "legal standard of morality," which superintends considerations of abstract justice.[204] According to Adams, however, in American constitutional theory, as exemplified by those principles in "the Declaration of Independence the Laws of Nature are announced and appealed to as identical with the laws of nature's God, and as the foundation of all obligatory laws."[205] Contrasting the principles of the Declaration with Lord Stowell's proclamation in *Le Louis*, Adams

[203] *The Antelope* (1825), 23 U.S. 66.
[204] *Le Louis* (1817), 2 Dodson 210.
[205] Adams, *Amistad Argument*, 126.

charged that a *merely* legal standard of morality served only "to supersede the laws of God, and justify, before the tribunals of man, the most atrocious crimes in the eyes of God."[206]

In Adams's constitutional theory, the principles of the Declaration of Independence provided the normative foundation for subsequent constitutional politics. Those natural law principles served to circumscribe executive power (which along with "*all* exercise of human authority must be under the limitation of right and wrong") while simultaneously requiring public authority to protect the natural rights of individuals.[207] Like Lincoln, Adams maintained that the Constitution drew its aspirational content from the founding document of the American regime, and, as George Anastaplo notes, Adams considered "the Constitution of 1787 the natural implementation of the principles of the Declaration."[208] Nonetheless, the seasoned statesman qualified this connection between the normative and existential orders with an acknowledgement that the constitutions of the American states and nation were the "work, not of eternal justice ruling through the people, but of man,—frail, fallen, imperfect man, following the dictates of his nature and aspiring to perfection."[209]

Throughout his *Amistad* argument, Adams maintained that there existed a certain tension between normative constitutional principles and the realities of political praxis, a tension that was inherent in man's fallen and imperfect state. This tension was saliently expressed in those compromises struck at the constitutional convention over the

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[206] *Ibid*.

[207] John Quincy Adams, *The Social Compact, Exemplified in the Constitution of the Commonwealth of Massachusetts* . . . (Providence: Knowles and Vose, 1842).

[208] George Anastaplo, "John Quincy Adams Revisited," 25 *Oklahoma City University Law Review* 134 (2000).

[209] Adams, *The Social Compact*, 32.

institution of slavery. Yet, morally and politically vicious as those compromises were, the "words slave and slavery [were] studiously excluded from the Constitution," decently concealing with circumlocutions an institution that was fundamentally inconsistent with the normative principles undergirding American constitutionalism.[210] While slavery existed under the authority of the various state constitutions, it was not recognized by the authority of the Federal Government, which was granted neither the power to establish nor to prohibit slavery in the states. At the same time, the moral legitimacy of both the state constitutions and the Federal Constitution rested on their congruence with the principles of the Declaration of Independence, which, according to Adams, were both true in principle *and* constitutionally relevant.

The Declaration of Independence did indeed provide the central ground upon which Adams based his *Amistad* argument. Pointing to two copies of the Declaration, "which [we]re ever before the eyes" of the justices, Adams declared:

> I know of no other law that reaches the case of my clients, but the law of Nature and Nature's God on which our fathers placed our own national existence. The circumstances are so peculiar, that no code or treaty has provided for such a case. That law, in its application to my clients, I trust will be the law on which the case will be decided by this Court.[211]

In the absence of some expressed provision of the positive law, Adams suggested, the law of nature would become *solely* operative, and, as Davis notes,

> What made the Amistad case so distinctive [e.g., in contrast to *The Antelope*] was the fact that the slave trade to Cuba was illegal after 1820, a violation of Spanish law as well as treaties . . . Since there was no Spanish or American law that authorized the slavery in the Amistad blacks, they were entitled to fall back on natural law even if that meant revolution.[212]

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[210] Adams, *Amistad Argument*, 39.
[211] *Ibid*., 9.
[212] Davis, *Inhuman Bondage*, 20.

The natural right to revolution in the Declaration was in fact a teaching concomitant with the doctrine of man's natural equality, and Adams insisted that such a doctrine be entertained by the highest judicial tribunal in the United States. In making this plea, Adams rested his argument squarely on the side of right, urging reconciliation between America's founding principles and the administration of her government, not by disobedience to law but through the securement of law in favor of those "unfortunate Africans, seized, imprisoned, helpless, friendless, [and] without language to complain."[213]

La Amistad and The Disharmonic Constitution

The story of how the Africans came to America under these unfortunate circumstances began a few years earlier in the Mende region of Sierra Leone. As Davis recounts, Joseph Cinqué, the principal defendant in the Amistad case, was in early 1839 "seized by four black strangers from his own tribe," chained by the neck to other captives, and forced to march for several days to the western coast of Africa. There he was sold, along with some five hundred other Africans, to merchants working for a prominent slaving family out of Havana, Cuba.[214] While the Cuban slave trade had been declared a form of piracy by Spanish law in 1820, the early "nineteenth-century Spanish government reaped enormous profits from Cuba's relatively sudden emergence as the world's greatest producer of sugar," and African slave labor was the engine that drove

[213] Adams, *Amistad Argument*, 52.
[214] Davis, *Inhuman Bondage*, 12.

such sugar production.[215] The increased demand for Cuban sugar exports led to an increased demand for the illicit importation of slave labor, and, in order to cloak the flourishing underground slave-trade in a pretense of legality, Spanish officials often issued documents certifying that newly captured slaves had been imported into Cuba *before* the criminalization of the trade in 1820.[216]

Such was the case when Cinqué and fifty-three others of the surviving Africans, along with papers falsely certifying their legal statuses, were sold in Cuba to Spanish slavers chartering the schooner *La Amistad*. The drama that eventually saw these individuals pleading for their freedom before the highest judicial tribunal in the United States began when the Africans, chained beneath deck and sailing for Puerto Príncipe some three hundred miles east of Havana, managed to free themselves before killing the ship's captain and cook, forcing some of the crew overboard, and overtaking their two remaining Spanish captors. After sailing for nearly two months in this condition, the Africans of the *Amistad* were then found by a U.S. brig off the coast of Long Island, and the vessel, along with its cargo and personnel, was taken into U.S. custody. As Joseph Story later recounted in his opinion for the Supreme Court, the legal controversy began when the two surviving Spaniards "filed claims [in U.S. federal courts] and asserted their ownership of the Negroes as slaves and parts of the cargo."[217]

> Under the ninth article of a 1795 treaty with Spain, the United States had agreed
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> . . . that all ships and merchandise, of what nature soever, which shall be rescued out of the hands of any pirates or robbers, on the high seas, shall be brought into some port of either state, and shall be delivered to the custody of the officers of that port, in order to be taken care of and

[215] *Ibid*.,13.

[216] Or, in the case of children, the documents would certify that they had been born in Cuba to a slave legally imported before 1820.

[217] *The Amistad* (1841), 40 U.S. 518.

> restored entire to the true proprietor, as soon as due and sufficient proof shall be made concerning the property thereof.[218]

As no one involved in the case of the *Amistad* disputed that the ship and its cargo were legally Spanish property that fell within the relevant treaty provision, the main legal controversy, Story pointed out, was "whether these negroes are the property" of the Spaniards and thus "ought to be delivered up."[219] Or, more specifically, the question was whether *men* might be included under the general title of merchandise, and, if so, whether these particular men should be so included when interpreting the treaty.

Story answered the first question in the affirmative, making clear that had the Africans been held legally as slaves under the laws of Spain, as was the case in *The Antelope*, then the Court could find

> . . . no reason why they may not justly be deemed within the intent of the treaty, to be included under the denomination of merchandise, and, as such, ought to be restored to the claimants: for, upon that point, the laws of Spain would seem to furnish the proper rule of interpretation.[220]

The case, in other words, hinged, like *The Antelope*, upon custom or usage, and, while relying on "the eternal principles of justice" for his final verdict that the Africans should be free, Story maintained the primacy of positive law over natural law in constitutional adjudication.[221] As Howard Jones writes, by declaring "that in the absence of positive law the eternal principles of justice had to prevail," Story had "implicitly legitimized the principle's corollary—namely, that with the *existence* of positive law, the same eternal principles became secondary."[222]

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[218] "Treaty of Friendship, and Navigation between Spain and the United States" (27 October 1795). Quoted by Story in *The Amistad* (1841).
[219] *The Amistad* (1841).
[220] *Ibid*.
[221] *Ibid*.
[222] Howard Jones, *Mutiny on the Amistad*, 192.

The possible tension alluded to by Story between positive law and the "eternal principles of justice" epitomized the conflict between fact and right confronted by antislavery jurists in slaveholding societies. At least since the famous *Somerset* decision in 1772, judges in England and the United States had often conceded that slavery ran counter to the law of nature even while maintaining that courts lacked any formal authority to overturn legislatively enacted statutes. In his influential study of nineteenth century antislavery jurisprudence, Robert Cover explains that "where positive law provided for slavery, the natural law idiom became a way of expressing the disparity between law and morality. It told of what law should be, but wasn't."[223] Perhaps fatigued by the extent to which slavery had been consistently denounced in the abstract and yet protected *de jure*, Adams's argument in the *Amistad* attempted to bridge this gap between law as it was and law as it ought to have been by emphasizing the convergence of fact and right in the case of the *Amistad* Africans.

Adams's *Amistad* argument, he later recounted, was "perfectly simple and comprehensive . . . admitting the steady and undeviating pursuit of one fundamental principle, the ministration of *justice*." [224] The former president and sitting Massachusetts congressman pursued this principle primarily through an examination of the logical foundations of American constitutionalism, which included an examination of the extent and scope of executive power and the natural law foundations of the writ of *Habeas Corpus*. Throughout the argument there was a general amalgamation of ideas, as he linked together a theory of natural rights, the Declaration of Independence, the Constitution, and limitations on arbitrary executive power. Noting, for example, that the

[223] Robert Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975), 17.

[224] *Memoirs of John Quincy Adams*, Vol. X, 24 February 1841, 431.

Van Buren Administration had originally acquiesced in the demand of the Spanish Ambassador to return at once the Africans to Cuba, Adams reflected,

> Is it possible that a President of the United States should be ignorant that the right to personal liberty is individual. That the right to it of every one, is *his own*—JUS SUUM; and that no greater violation of his official oath to protect and defend the Constitution of the United States, could be committed, than by an order to seize and deliver up at a foreign minister's demand, thirty-six persons, in a mass, under the general denomination of *all*, the negroes, late of the Amistad. That he was ignorant, profoundly ignorant of this self-evident truth, inextinguishable till yonder gilt framed Declarations of Independence shall perish in the general conflagration of the great globe itself. I am constrained to believe—for to that ignorance, the only alternative to account for this order to the Marshal of the District of Connecticut, is wilful and corrupt perjury to his official presidential oath.[225]

Adams thus assumed that an oath to protect and defend the Constitution was concomitantly an oath to protect and defend the right to individual liberty, a right founded upon those self-evident truths embraced by the "gilt framed Declarations of Independence" on display in the Supreme Court chambers.

Adams was not, however, naïve about the difficulty of his argument, and he assumed no consensus about the principles which he avowed. To the contrary, he acknowledged that nearly all of the parties involved in the case had "perverted their minds with regard to all the most sacred principles of law and right, on which the liberties of the United States are founded."[226] Those principles of law and right, and the "combined powers and dominions" struggling against them in favor of the continuance of

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[225] Adams, *Amistad Argument*, 82. Davis explains, "When the trial began in the federal district court in New Haven . . . the president diverted a small naval vessel, the USS Grampus, to New Haven harbor. He issued secret orders to the district attorney to have the captives smuggled to the ship, presumably in the wholly expected even of a court decision favorable to the president and to Spain. Such action would immediately cut off any right of an appeal to the Supreme Court. But as John Quincy Adams . . . would later point out to the Supreme Court, Van Buren's order was 'not conditional, to be executed only in the event of a decision by the court against the Africans, but positive and unqualified to deliver up all the Africans in his custody . . . while the trial was pending.'" See Davis, *Inhuman Bondage*, 18.

[226] Adams, *Amistad Argument*, 95.

the African slave trade, revealed the extent of the disharmony between fact and right in American constitutionalism. Moreover, the character of this constitutional disharmony in Adams's argument took on several dimensions as he moved between the compromises in the constitutional text, the disparity between principles and action in historical practice, and the metaphysical or philosophical problem engendered by the enslavement of a rational being endowed with a natural right to liberty.

The constitutional text, Adams argued in a formula that became prominent in later antislavery constitutional thought,

> . . . recognizes the slaves, held within some of the States of the Union, only in their capacity of *persons*—*persons* held to labor or service in a State under the laws thereof—*persons* constituting elements of representation in the popular branch of the National Legislature—*persons*, the migration or importation of whom should not be prohibited by Congress prior to the year 1808. The Constitution no where recognizes them as property . . . Slaves, therefore, in the Constitution of the United States are recognized only as *persons*, enjoying rights and held to the performance of duties.[227]

Certainly the historical situation was more complicated—as Adams himself admitted in other places—but the point remained that the inconsistency of slavery with the principles of government avowed in America's founding documents was recognized by most of the constitutional framers even as they made constitutional provisions for the protection of slavery from federal interference. One of the New York delegates to the convention, for example, writing under the anti-federalist pseudonym Brutus, observed during debates over the Constitution's ratification,

> If we collect the sentiments of the people of America, from their own most solemn declarations, they hold this truth as self-evident, that all men are by nature free. No one man, then, or any class of men, have a right, by the

[227] Adams, *Amistad Argument*, 39.

> laws of nature, or of God, to assume or exercise authority over their fellows.[228]

Brutus later pointed to the inconsistency of the doctrine of man's natural equality with the constitutional compromises struck concerning "their fellow men, who are held in bondage . . . contrary to all the principles of liberty, which have been publickly avowed in the late glorious revolution."[229] Surely it was this inconsistency that led to the sentiment, voice by the slave-holder Madison, that it would be "wrong to admit in the constitution the idea that there could be property in men."[230]

The inconsistency between the publicly avowed principles of the American Revolution and the subsequent history of political practice constituted the second prong of Adams's attack on the legitimacy of slavery in America. Particularly important to Adams's argument was the principle behind *Habeas Corpus*. If the logic of that Great Writ, which was assumed by the Constitution to be operative in the new federal regime, hinged on the proposition that arbitrary detention is inconsistent with the requirements of justice, how then, Adams wondered, might the President of the United States, upon his own authority and without a judicial hearing, ship the *Amistad* Africans back to Cuba? The adverb used by the Spanish Ambassador in his request that the Van Buren administration return the Africans to Cuba was *gubernativamente*, and, as Adams reflected,

> It means, by the simple will or absolute *fiat* of the Executive . . . that is what the Spaniard means by *gubernativamente*, when he asks the

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[228] Brutus, "Letter II," in Herbert Storing, *The Anti-Federalist*, 2nd edition, 2.9.24 (Chicago: University of Chicago Press, 1985). The letters of Brutus were probably written by New York delegate Robert Yates. As Herbert Storing explains, "The essays [of Brutus] have generally been attributed to Robert Yates on the authority of Paul Leicester Ford." See Storing, *The Anti-Federalist*, 103.

[229] Brutus, "Letter II," in Storing, *The Anti-Federalist*, 2.9.39.

[230] James Madison, *Notes of Debates in the Federal Convention of 1787* (New York: W.W. Norton & Company, 1987), 532.

> Executive of the United States, by its own *fiat*, to seize these MEN, wrest them from the power and protection of the courts, and send them beyond the seas![231]

Adams attributed this demand by the Spanish Ambassador to a fundamental misapprehension of the principles of American government. Rhetorically, Adams asked,

> Is it possible to speak of this demand in language of decency and moderation? Is there a law of Habeas Corpus in the land? Has the expunging process of black lines passed upon these two Declarations of Independence in their gilded frames? Has the 4th of July, '76, become a day of ignominy and reproach?[232]

Thus, in Adams's interpretation, the principles of *Habeas Corpus* and the principles of the Declaration—"deep principles, involving the very foundation of the liberties of this country"[233]—coalesced in their circumscription of arbitrary executive power.

The moral right not to be subject to arbitrary force was, moreover, a right that was not dependent upon one's status as an Englishman or an American but rather was dependent upon one's status as a man. Appealing to "common humanity, independent all law," Adams insisted that the Africans be afforded certain protections that were due to them simply by virtue of the kind of beings they were.[234] Thus the rights of human nature provided the foundation for Adams's third, and perhaps most penetrating, assault on the disparity between fact and right in the American constitutional order. Moving beyond the tensions in the constitutional text and the gross contradiction between American ideals and the history of American practice, Adams appealed finally to simple justice.

In his *Antelope* opinion, Marshall had suggested that the right to slavery, recognized by international law, was founded on the right of conquest in war. In his

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[231] Adams, *Amistad Argument*, 38.
[232] *Ibid*., 43.
[233] *Ibid*., 69.
[234] *Ibid*., 89.

review of the case, Adams insisted, "with all possible reverence for the memory" of the esteemed Chief Justice, that Marshall had both misinterpreted the requirements of the positive law of nations and perniciously discarded natural law reasoning as irrelevant to the construction of the positive legal rules at play. It was an "error of the first concoction," Adams later asserted, to proclaim a "*legal standard of morality*, different from, opposed to, and transcending the standard of nature and of nature's God."[235]

A similar error was provided by an article published in the *Executive Journal of Administration*, likely by John Calhoun, which competently rehearsed several of the pro-slavery arguments fashionable among intellectuals in the antebellum south. "The truth is," the author proclaimed,

> . . . that property in man has existed in all ages of the world, and results from the *natural* state of man, *which is war*. When God created the first family and gave them fields of the earth as an inheritance, one of the number, in obedience to the impulses and passions that had been implanted in the human heart, rose and slew his brother. This universal nature of man is alone modified by civilization and law. War, conquest, and force, have produced slavery, and it is state necessity and the internal law of self preservation, that will ever perpetuate and defend it.[236]

In rebuttal, Adams insisted that such a principle would reduce all of the rights of man to violence or force. Like the position espoused by Thrasymachus in Plato's *Republic*, justice would merely connote the interest of the stronger. "No man has a right to life or liberty, if he has an enemy able to take them from him," Adams summarized.

> There is the principle. There is the whole argument of this paper. Now I do not deny that the only principle upon which a color of right can be attributed to the condition of slavery is by assuming that the natural state of man is War. The bright intellect of the South, clearly saw, that without this principle for a corner stone, he had no foundation for his argument.[237]

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[235] *Ibid*., 126.
[236] *Ibid*., 88.
[237] *Ibid*., 89.

Adams asserted that such an argument was "utterly incompatible with any theory of human rights, and especially the rights which the Declaration of Independence proclaims as self-evident truths."[238]

Those self-evident truths led to theoretical absurdities when trying to classify men as the property of other men. As the ancient Roman jurist Justinian had pointed out in his *Institutes*—a work quoted by Adams in his opening salvo—the law of slavery "makes man the property of another, contrary to the law of nature,"[239] and this tension led to certain existential contradictions or inconsistencies in the positive law. In his application of the relevant treaty provision to the *Amistad* case, for example, Story had suggested that the Africans would have been considered as property if they had been so deemed by the laws of Spain. But, as Adams pointed out, his "clients [were] claimed under the treaty as merchandize, rescued from pirates and robbers," and this situation begged the question, "Who were the merchandise and who were the robbers?"[240] The Africans, in other words, were being considered in one and the same breath as inanimate chattel and as rational and moral beings capable of piracy and theft. They were the robbers even as they were the merchandise. "Can a greater absurdity be imagined in construction than this," Adams asked, "which applies the double character of robbers and merchandise to human beings?"[241]

A similar problem had emerged in *Federalist* No. 54 as Madison attempted, in the character of the "Southern Gentleman," to offer a coherent account of the ways in which slaves were treated in American law as both property and persons. "The slave may

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[238] *Ibid*., 89.
[239] Justinian, *Institutes of Justinian*, Book 1, Chapter 3.
[240] Adams, *Amistad Argument*, 23.
[241] *Ibid*., 23.

appear," the Southern Gentleman conceded, "to be degraded from the human rank, and classed with those irrational animals which fall under the legal denomination of property." But, in other ways—chiefly in being held accountable for wrongs committed by him against others—"the slave is no less evidently regarded by the law as a member of the society, not as a part of the irrational creation; as a moral person, not as a mere article of property."[242] This contradiction between the true nature of the slaves as moral persons and the attempt through law to place them under what the Southern Gentleman deemed the "unnatural light of property" led to the curious situation, in the application of the 1795 Treaty, of considering the Africans both as chattel and as moral agents responsible for pirating themselves.

A second line of argument advanced by Spanish claimants was that if the Africans were not slaves to be returned as property, then they were assassins to be delivered as a matter of justice. But in the absence of a ruling provision providing for such a remedy, Adams insisted that the Africans be considered according to their humanity, along with concomitant the rights of humanity, including the right of revolution. For once they were considered in their status "as men—as infant females, with flesh, and blood, and nerves, and sinews"—then the demand for their return, either as merchandise or as assassins, descended into absurdity, hinging not on *justice* but on *sympathy* for one of the parties in the case.[243] When considering them as men, moreover, the principles of the American Revolution became determinative: "The moment you come, to the Declaration of

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[242] *The Federalist* No. 54.

[243] Adams, *Amistad Argument*, 40. See also pg. 6: "The charge I make against the present Executive administration is that in all their proceedings relating to these unfortunate men, instead of *Justice*, which they were bound not less than this honorable Court itself to observe, they have substituted *Sympathy!*—sympathy with one of the parties in this conflict of justice, *Antipathy* to the other. Sympathy with the white, antipathy to the black . . . ."

Independence," Adams asserted, "that every man has a right to life and liberty, an inalienable right, this case is decided. I ask nothing more in behalf of these unfortunate men than this Declaration."[244]

THE LAW OF NATURE IN A NATION OF LAWS

It would be inaccurate to conclude from Adams's explicit appeal to the natural law principles of the Declaration of Independence that he was ignorant of the practical difficulties—perhaps impossibilities—of fully realizing those principles on the ground. The disharmony of fallen human nature itself prohibited such Utopian speculations, and Adams suggested that prudential politics must take account of both the possibilities and limits of statesmanship. Within the context of a prohibition measure in the Massachusetts state legislature, Adams previously observed,

> There is no duty more impressive upon the legislature than that of accommodating the exercise of its power to the spirit of those over whom it is to operate. Abstract right, deserving as it is of the profound reverence of every ruler over men, is yet not the principle which must guide and govern its conduct; and whoever undertakes to make it exclusively his guide will soon find in the community a resistance that will overrule him and his principles.[245]

The same might have been said for the duty of the courts, as there were certainly dangers in making abstract right the exclusive guide to adjudication. Yet, Adams seemed to do precisely this, emphasizing the peculiarity of the *Amistad* case and suggesting that no other law than the law of nature could be invoked to decide the rights of his clients.

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[244] *Ibid*., 89.

[245] Quoted in Bennett Champ Clark, *John Quincy Adams: "Old Man Eloquent"* (Boston: Little, Brown and Company, 1933), 379-80.

A clue to the motivation behind Adams's emphasis on the Declaration in the *Amistad* case perhaps is provided by his journal entry one score and two years previously, as he contemplated, in the midst of the controversy leading to the Missouri Compromise, the historical trajectory of the axioms of the Declaration. Those natural law principles, Adams wrote, "laid open a precipice into which the slave-holding planters of this country sooner or later must fall."[246] The disharmonic state of the American constitutional order was tided over for time by Henry Clay's legislation, but Adams saw clearly that the compromise was temporary, that there would come a time when the constitutional disharmony created by the bargain between freedom and slavery could no longer be maintained.

In his later reflections on the Missouri Compromise, Adams presciently proclaimed that "if slavery be the destined sword in the hand of the destroying angel, which is to sever the ties of this Union, the same sword will cut asunder the bonds of slavery itself."[247] As early as February 1820, a fifty-two year old Adams had contemplated such a dissolution, declaring that

> Slavery is the great and foul stain upon the North American Union, and it is a contemplation worthy of the most exalted soul whether its total abolition is or is not practicable: if practicable, by what means would accomplish it at the smallest cost of human sufferance. A dissolution, at least temporary, of the Union, as now constituted, would be certainly necessary, and the dissolution must be upon a point involving the question of slavery, and no other. The Union might then be reorganized on the fundamental principle of emancipation. This object is vast in its compass, awful in its prospects, sublime and beautiful in its issue. A life devoted to it would be nobly spent or sacrificed.[248]

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[246] *Memoirs of John Quincy Adams* (December 27, 1819) 4:492-493.

[247] Quoted in Josiah Quincy, *Memoir of the Life of John Quincy Adams* (Boston: Phillip, Sampson & Co., 1858), 114.

[248] *Memoirs of John Quincy Adams* (24 February 1820), 4:531.

By the time he was called upon to represent the Africans in the *Amistad* case, an older Adams had grown weary. His decade long battle with the congressional gag rule against antislavery petitions in the House of Representatives had hardened him to the spirit of compromise, and he no longer had the patience to acquiesce in the maintenance of American constitutional disharmony.[249] Comparing the *Amistad* case to the *Antelope*, Adams insisted that he did not question the propriety, in 1825, of "postponing the discussion," but, Adams demanded, it was "no longer a time for this course, the question must be met, and judicially decided."[250]

In Adams's concluding remarks before the Court, he declared, in an untranslated verse from Virgi's *Aeneid*, "*hic caestrus artemque repono*."[251] Adams's Latin quotation, taken from the legendary but aged boxer Entellus's post-fight oration, after his defeat of the brazen and much younger challenger Dares, translated: "In this place I, the victor, put down my gloves and my training." As Michele Valerie Ronnick points out, however, Adams edited out the word *victor*.[252] He could not know if victory lay on the horizon, but he did indeed view himself as an old fighter nobly confronting a new challenge. That new challenge was provided by the rising defense of slavery as something good to be preserved and protected rather than a necessary evil to be tolerated; the cornerstone of American democracy rather than the rock upon which it must break. Because of this new challenge, American constitutional disharmony might have found its resolution in *favor* of slavery as a perpetual and fundamental institution, and the Declaration of

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[249] For an account of this part of Adams's career, see William Lee Miller, *Arguing Against Slavery: The Great Battle in the United States Congress* (New York: A. Knopf, 1996).

[250] Adams, *Amistad Argument*, 94.

[251] *Ibid*., 135.

[252] Michele Valerie Ronnick, "Virgil's *Aeneid* and John Quincy Adams's Speech on Behalf of the Amistad Africans," *The New England Quarterly*, Vol. 71, No. 3, September 1998, 473-477.

Independence was the final obstacle, the last stumbling block, to those forces working toward such a resolution.

In the year of his death, 1848, Adams's old colleague John Calhoun declared during congressional debates on the Oregon Bill that the cause of the crisis in American constitutionalism was found in "the most false and dangerous of all political errors," expressed in the proposition that "all men are born free and equal" and in the "not less erroneous" version of that proposition found in the Declaration.[253] As Adams predicted, the veracity of the Declaration's principles had to be denied before slavery could be defended as a positive good and a constitutional value to be enlarged and protected. Indeed, the proper resolution of the disharmony between fact and right, in all of its various dimensions, was precisely the point upon which the American house became divided.

Adams did not live to see the resolution of this conflict, but his mark and influence was easily recognized, a decade later, in the arguments put forward by antislavery constitutionalists associated with a new political party, founded expressly for "the maintenance of the principles promulgated in the Declaration of Independence."[254] Yet in a climate of heightened ideological contestation over constitutional identity and constitutional meaning, the Court's "affirmation of freedom [in the *Amistad* case] may well have helped to motivate Chief Justice Roger Taney to issue his later defense of slavery and official racism in his infamous Dred Scott decision of 1857."[255] Amid the new and grave challenge to America's revolutionary principles posed by Taney's

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[253] See John C. Calhoun, "Speech on the Oregon Bill" (27 June 1848) in H. Lee Clark, Jr., ed., *John C. Calhoun: Selected Writings and Speeches* (Washington, D.C.: Regnery, 2003), 661-684.

[254] "Republican Party Platform" (1856) in *National Party Platforms: Volume I, 1840-1956*, compiled by Donald Bruce Johnson (Champaign, IL: University of Illinois Press, 1978), 27-28.

[255] Davis, *Inhuman Bondage*, 26.

opinion, moreover, the historically marginalized Supreme Court justice John McLean, in his spirited *Dred Scott* dissent, soon took up the mantle, alongside Abraham Lincoln, as defender of an antislavery constitutional tradition that was preserved through a dark time in American history by John Quincy Adams.

Much of the scholarly literature, however, has struck a discordant note in generally praising Lincoln's opposition to the *Dred Scott* opinion while discounting the merits of McLean's dissent. This, I suspect, is due partially to the degree in which modern constitutional theory is uncomfortable with treating McLean's natural law arguments as *legal* arguments. Based on an overdrawn distinction between reasons legal and political, scholars have dismissed McLean as a mere politician in judicial garb while nonetheless praising the lawyer/politician Lincoln, even though their arguments drew from the same tradition of natural law constitutionalism stretching back to the *Somerset* case (itself cited as an authority by McLean) and extending to antislavery Whigs and late antebellum Republicans. In the next chapter, I offer a reconsideration of the merits of McLean's dissent within the context of Lincoln's constitutional thought, and I demonstrate the ways in which a natural law framework was relevant to the construction and application of the positive legal rules at play in the important and challenging case of *Dred Scott*.

Chapter 4: Lincolnian Natural Right, *Dred Scott*, and the Jurisprudence of John McLean

"Our independence was a great epoch in the history of freedom," asserted the anti-slavery jurist John McLean in response to the Court's limited and racist interpretation of the significance and meaning of the Declaration of Independence in *Dred Scott v. Sandford* (1857). In what has come to be considered the majority opinion, Chief Justice Taney sought to establish "too clear[ly] for dispute" the prevailing animus toward members of the African race during the founding era, the intent of the constitutional framers to exclude members of that "unfortunate" race from political society, and the acquiescence of the Founders to—and their participation in—a system of race-based chattel slavery that was already well established in the states by 1776 and was left untouched by the events of 1787. McLean, while conceding that the "Government was not made especially for the colored race," nonetheless noted that as a matter of historical fact "many of them were citizens of the New England States, and exercised the rights of suffrage when the Constitution was adopted." Yet quite independent of any historical squabble over the intentions and motivations of those men who wrote the document, McLean asserted that "[a]ll slavery has its origin in power, and is against right."[256]

Perhaps the moral indignation evident in McLean's dissent has rendered it less serious to scholars, who nearly universally have considered it the weaker of the case's two dissenting opinions. McLean's presidential ambitions were well known, and, as a

[256] *Dred Scott v. Sandford*, 60 U.S. 393 (1857) at 537 (McLean, J., dissenting).

consequence, much of the moral language employed in his opinion has been interpreted as *obiter dictum* directed at placating the abolitionist sentiment of the emerging Republican Party. A brief survey of some of the relevant literature reveals that McLean's dissent "was not an impressive legal document,"[257] that it contained "more emphasis than logic,"[258] exhibited "more bluster than sound reasoning,"[259] and marshaled arguments that were both "erroneous and beside the point."[260] Moreover, scholars have identified the impetus behind McLean's second-rate judicial opinion—with its "seemingly gratuitous assaults on the institution of slavery"[261]—as the Ohio justice's "blind[ing] . . . political ambition,"[262] which compelled him always to keep "one eye on the Constitution and another on political fortune."[263]

In this chapter, I seek to recover an appreciation for the depth and importance of the constitutional principles articulated by McLean in his *Dred Scott* dissent. To this end, I note the great affinity between McLean's opinion and certain aspects of Lincoln's constitutional thought. It perhaps should be noted that in appealing to the opinions of Lincoln on this subject, I am not claiming that Lincoln's arguments regarding *Dred Scott* are somehow indebted to McLean's dissent (though certainly Lincoln was familiar with the various opinions in the case). Rather, I reference Lincoln's subsequent comments on

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[257] James F. Simon, *Lincoln and Chief Justice Taney: Slavery, Secession, and the President's War Powers* (New York: Simon and Schuster, 2006), 127.

[258] David M. Potter, *The Impending Crisis: 1846-1861*, ed. Don Fehrenbacher (New York: Harper and Row, 1976), 278.

[259] David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888* (Chicago: University of Chicago Press, 1985), 279.

[260] Edward S. Corwin, "Dred Scott," in *The Doctrine of Judicial Review* (Princeton: Princeton University Press, 1914), 145.

[261] Earl Maltz, *Dred Scott and the Politics of Slavery* (Lawrence: University of Kansas Press, 2007), 132.

[262] Frank H. Hodder, "Some Phases of the Dred Scott Case," in *Mississippi Valley Historical Review*, Vol. 16, No. 1 (June 1929), 22.

[263] Donald Lively, *Foreshadows of the Law: Supreme Court Dissents and Constitutional Development* (Westport, Connecticut: Praeger Publishers, 1992), 441.

the *Dred Scott* case in order to illuminate some of the principles at work in the antebellum antislavery movement generally and in McLean's dissenting opinion specifically. In particular, I argue that McLean shares in common with Lincoln an aspirational theory of the Constitution and an understanding of natural right that are both absent from Curtis' dissenting opinion and that compel McLean to differ from Curtis on the Fifth Amendment question.[264] Additionally, I argue that it is inadequate to treat McLean's opinion as "political rather than legal."[265] In his discussion of the nature of law and constitutional aspirations, as well as property rights and the humanity of the slave, McLean makes several arguments that add substantive content to "the keen discrimination and masterly reasoning of Curtis"[266] while simultaneously challenging some key aspects of Curtis' constitutional thought. Contemporary scholarship celebrates both Lincoln's opposition to the *Dred Scott* case and Curtis' dissenting opinion, but it often casts a skeptical eye on the arguments made by McLean. I also make the normative argument that much of the criticism of McLean's opinion rests on an inchoate

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[264] For a history of the case, see Don E. Fehrenbacher, *Slavery, Law, & Politics: The Dred Scott Case in Historical Perspective* (New York: Oxford University Press, 1981). The parties to the case agreed on these facts: Mr. Scott was a Missouri slave who traveled with his master to the free state of Illinois and the free territories north of Missouri. Scott later returned with his master to Missouri where he sued for his own freedom, alleging that his residence in a free territory effectively manumitted him from his former state of slavery. After his master's death, Scott's ownership was transferred to a citizen of New York, and the case entered the federal court system under the diversity of citizenship requirement for federal law suits (U.S. Const., Art. 3§2). On the preliminary question of jurisdiction, Taney considered whether Scott was a citizen within the meaning of the word 'citizen' as it is used in the Constitution. Because part of Scott's claim to the status of citizen rested on his prior claim that he was made free by his residence in free federal territories, Taney considered whether the piece of legislation (i.e., the Missouri Compromise of 1820) that barred slavery from the territories was constitutional. When considering the constitutionality of the Missouri Compromise, moreover, Taney inquired into whether the Fifth Amendment's protection against deprivation of property without due process of law prevented the national government from prohibiting slave property in the federal territories. Taney argued that it did: Justices Curtis and McLean dissented from Taney's conclusion, but, as I argue, they did so for substantially different reasons.

[265] Roy F. Nichols, review of *The Life of John McLean: A Politician on the Supreme Court* by Francis Weisenburger, *The Mississippi Valley Historical Review*, Vol. 25, No. 1 (June 1938), 113.

[266] *Memorial Biographies of the New England Historical-Genealogical Society*, Vol. IV, (1885), 275. Quoted in Francis P. Weisenburger, *The Life of John McLean* (Columbus: The Ohio State University Press, 1937), 187.

view of law that is dismissive of natural law reasoning.[267] Laying aside all conjectures as to the influence of McLean's political ambitions upon his judicial motivation, I evaluate his *Dred Scott* dissent in light of a more nuanced model of law. For this task, I particularly rely on certain insights from John Finnis' discussion of legal injustice.[268] Don Fehrenbacher's observation that McLean's opinion was not as "thorough, scholarly, and polished"[269] as Curtis' seems, in some sense, to be correct; nevertheless, within his somewhat desultory opinion, McLean both supplemented and challenged Curtis' legal reasoning.

In the following sections of this chapter, I first discuss the nature of law through a framework that relies on one aspect of John Finnis' natural law theory, which claims in part that what is "legal" is not limited to positive law but extends, in its focal sense, to what is just and unjust *simpliciter*. I then use this framework to analyze the theory of constitutional aspiration as it is put forward by McLean and Lincoln, respectively before analyzing the respective arguments put forward by McLean and Lincoln regarding the nature of man and the logic of substantive property rights in the Fifth Amendment. Throughout the chapter, I contrast the McLean-Lincoln argument with the argument put forward by fellow dissenter Benjamin Curtis, and I suggest that the moral-philosophical aspect of the McLean-Lincoln position is an essential supplement, and at times a challenge, to Curtis' institutional-historical approach.

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[267] Part of my argument is that the influence of legal positivism has led to an unwarranted characterization of McLean's opinion as less "legal" than Benjamin Curtis' opinion. Scholars in the legal positivist school are suspicious of any moral claim made in the process of legal reasoning that is based on an authority collateral to the posited or implied intra-systemic legal rules or principles. Accordingly, many of McLean's arguments are dismissed as "political" or "emotional" or otherwise less than "legal." McLean's biographer, for instance, asserted that that his "judicial policy implied a flexibility in the application of the law that . . . left the door open especially to opinions based upon emotional reactions." See Weisenburger, *The Life of John McLean* , 228.

[268] See John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980), 351-367.

[269] Fehrenbacher, *Slavery, Law and Politics*, 221.

THE NATURE OF LAW

Given McLean's frequent use of natural rights language and his sometimes explicit appeal to the natural law tradition, it is perhaps appropriate to note that within the context of eighteenth and nineteenth-century Anglo legal philosophy, "propositions of natural law or natural justice had an accepted, nonrevolutionary role to play."[270] The nonrevolutionary character of McLean's natural law jurisprudence was most evident in cases where he perceived a clear disjuncture between what the law required and what was just.[271] Quoting approvingly from the case of *Rankin v. Lydia*, McLean wrote in his *Dred Scott* dissent, "In deciding the question, (of slavery), we disclaim the influence of the general principles of liberty, which we all admire, and conceive it ought to be decided by the law as it is, and not as it ought to be."[272] Yet even within McLean's "retreat to formalism"—such as his assertion that the judge should decide the law as it is rather than as it ought to be—natural law reasoning played a foundational jurisprudential role.[273] As Robert Cover notes, ". . . the natural law tradition was more important for what it said about law than for what it said as law."[274] And although McLean likely was more familiar with the distinctly modern natural law theories of the seventeenth and eighteenth

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[270] Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Have: Yale University Press, 1975), 17.

[271] For an in depth treatment of the moral-formal dilemma faced by antislavery jurists, see Cover, *Justice Accused*, 197-267: ". . . the judge's problem in any case where some impact on the formal apparatus could be expected, was never a single-dimensioned moral question—is slavery or enslavement, or rendition to slavery, morally justified or reprehensible? Rather, the issue was whether the moral values served by antislavery (the substantive moral dimension) outweighed interests and values served by fidelity to the formal system when such values seemed to block direct application of the moral or natural law proposition" (197).

[272] *Dred Scott* at 562 (McLean, J. dissenting), quoting from the Kentucky Court of Appeals, 1820 (2 A.K. Marshall's Rep.). McLean cites this case within his discussion of the locality of slavery.

[273] See Cover, *Justice Accused*, Part II: "Rules, Roles, and Rebels: Nature's Place Disputed," 119-192.

[274] Cover, *Justice Accused*, 19.

centuries, still there is a philosophical strand running through the whole of the natural law tradition that sheds light on McLean's foundational premises concerning the convoluted question, "What is law?"

It is a famous caricature of natural law theory that the theory itself may be summed up by the words of Augustine, given force by Aquinas, that "an unjust law seems to be no law at all."[275] Yet a sympathetic stance toward the theory of natural law coupled with a careful examination of concrete examples of legal injustice will reveal that this phrase represents the way in which one and the same grammatical form (e.g., 'law') may assume different meanings in different contexts. Perhaps the inadequacy of understanding natural law theory simply as the phrase "*lex injusta non est lex*" lies in the tendency of such an understanding to collapse the necessary distinction between the various senses of the word "legal," thus collapsing the necessary distinction between what is, in some sense, "legal" and what is "just."[276]

In his discussion of natural law and legal injustice, Finnis further distinguishes analytically between various types of normative statements, such as the statement that some laws are not laws at all. For example, Finnis argues that one who makes a normative statement about law may intend to assert one of three meanings within one and the same grammatical form:

> (S_1) what is justified or required by practical reasonableness *simpliciter* [i.e., what is "just"], or (S_2) what is treated as justified or required in the belief or practice of some group, or (S_3) what is justified or required *if*

[275] See Thomas Aquinas, *Summa Theologica*, I-II, Q.95, A.II.

[276] See Finnis, *Natural Law and Natural Rights*, 364. "For the statement is either pure nonsense, flatly self-contradictory, or else it is a dramatization of the point more literally made by Aquinas when he says that an unjust law is not law in the focal sense of the term 'law' [i.e., *simpliciter*] notwithstanding that it is law in a secondary sense of that term [i.e., *secundum quid*]."

> certain principles or rules are justified (but without taking any position on the question whether those principles or rules *are* so justified).[277]

With these distinctions in mind, the proposition "an unjust law is not law" becomes less enigmatic: The statement is asserting that (S_2/S_3) a rule has the status of law in a given community; that the community's law is judged to be unjust by a source collateral to the legal system itself; and, therefore, that an unjust law is not (S_1) law in the focal sense of the word because it commands what is unjustified by practical reasonableness (i.e., it commands one to do what one ought not to do). Or, in other words, the statement is asserting (S_2) that some law has obtained force in the community through the administration of the municipal law and/or (S_3) that such a law is justified or required according to some set of intra-systemic legal rules or principles, yet (S_1) the law is without foundation in justice or natural right.

I mention the different possible connotations of the same grammatical form "law"—and the application of this distinction to the classical formula "*lex injusta non est lex*"—in order to emphasize a broader way of thinking about law that permeates McLean's dissenting opinion. When McLean asserted in protest to Taney's Due Process argument that "[t]he slave is not mere chattel," he was making an (S_1) assertion without regard to whether or not the slave, from the (S_2/S_3) perspective, was merely chattel. McLean recognized, for instance, that fugitive slave laws had force according to the Constitution and that the municipal laws of various communities under the Constitution sanctioned systems of chattel slavery; yet, McLean's statement that the slave was more than just property was not in any way inconsistent with Justice Curtis' assertion that whether or not "the slave is known to the law simply as chattel, with no civil rights" was

[277] Finnis *Natural Law and Natural Rights*, 365.

determined by the municipal law in force. As it happened, McLean also agreed with Curtis against Taney that the right to property in a slave was neither distinctly nor expressly affirmed in the Constitution and that Congress in its regulation of the federal territories had never considered any such property right to be so enshrined.[278] It is important to keep in mind that McLean, while considering the requirements of the law, frequently shifted from one of these three viewpoints to another, often asserting multiple types of normative statements within the same discussion.

It is precisely because McLean thought the intra-systemic legal rules laid down by the Constitution did not sanction and enforce a right to own property in slaves that he assented to the justness of the legal order itself. As Cover notes in a somewhat Lincolnian allusion:

> A judge like John McLean respected the formal structure of his role because of a faith in the ultimate necessity and utility of a legal system with integrity. But that respect was founded in large part on a firm conviction that the Constitution—the ultimate source of formalism—was not itself committed to slavery. It was that conviction that was at the heart of his dissent in *Dred Scott*.[279]

McLean recognized that the polity's present sins were in some sense codified in its formal legal order even while he asserted that the formal legal order itself provided the materials necessary for the polity's future redemption.[280] In a certain respect, then, McLean shared an important premise with Lon Fuller: "If laws, even bad laws, have a claim to our respect, then law must represent some general direction of human effort that

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[278] To demonstrate the analytical separation of these perspectives, consider that Chief Justice Taney and the Garrisonian abolitionists *both* considered (S_2) the right to property in a slave to be "distinctly and expressly affirmed in the Constitution" while disagreeing on the (S_1) reasonableness or justness of slavery itself.

[279] Cover, *Justice Accused*, 209.

[280] For a similar discussion, in a different context, see J.M. Balkin, "Agreements with Hell and Other Objects of Our Faith," 65 *Fordham Law Review* (1997).

we can understand and describe, and that we can approve in principle even at the moment when it seems to us to miss the mark."[281] For McLean, no less than Lincoln, the general direction of human effort represented by the Constitution was toward liberty; slavery was anomalous to the liberal aspirations of the constitutional order and, as such, is illegitimate in principle even while obtaining force through local legislation.

NATURAL LAW AND THE THEORY OF CONSTITUTIONAL ASPIRATION

The theory of constitutional aspiration is a theory of constitutional interpretation that emphasizes the moral foundations of American constitutionalism and views American constitutional development, in part, as the progressive realization of the axioms of the American Founding.[282] As the various opinions in *Dred Scott* make clear, however, there were ambiguities and even injustices codified in varying degrees in the Constitution. Indeed, the interpretive difficulty was compounded by the existence of competing liberal and illiberal constitutional commitments.[283] Still, the aspirational claims of a jurist like McLean were, first, that one need not remain neutral with respect to competing and even disparate aspects of the constitutional order and, second, that the constitutional text was predominantly committed to true principles of right. Moreover, the most famous exposition of this position is found in the celebrated debates between

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[281] Lon Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart," *Harvard Law Review*, Vol. 71, No. 4 (February 1958), 632.

[282] The theory of constitutional aspiration, as it is used in this context, should be distinguished from aspirational theories that self-consciously reject the principles of the Declaration of Independence and the Constitution of 1787 and/or deny the relevance of nature as a source of moral norms.

[283] See, for example, Rogers Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven: Yale University Press, 1999) and Mark Graber, *Dred Scott and the Problem of Constitutional Evil* (Cambridge: Cambridge University Press, 2006).

Abraham Lincoln and Stephen Douglas. In his exchange with Douglas, Lincoln argued that the Supreme Court's ruling in *Dred Scott* did not fully settle the constitutional question, in part because the Court rejected true principles of natural right, which served to undergird the logic of the constitutional text.

Constitutional Aspirations in *Dred Scott*

The positions taken by Taney and McLean (and, to a lesser extent, Curtis) concerning the meaning and purpose of certain pre-constitutional principles with respect to American citizenship and slavery were precursors to those great senatorial debates between Lincoln and Douglas. According to Taney, colonial laws regarding the status of the African race supported, and the intent and practice of the signers of the Declaration of Independence affirmed, the claim that the sovereign political body created by the Constitution of 1787 did not—nor could it ever—include Africans held in slavery. Moreover, members of this class of persons did not constitute foreigners such that they might have been naturalized by congressional legislation. Rather, they were an altogether separate class, neither members of the sovereign body nor members of a foreign nation. Being esteemed by the colonists to be "so far inferior, that they had no rights which the white man was bound to respect . . . [Africans] were bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it."[284] Given that the system of race-based chattel slavery continued throughout the revolutionary era, it was inconceivable to Taney that the Founders intended to declare—

[284] *Dred Scott* at 407 (Taney, J.).

or even to entertain the possibility of—the equality (political or otherwise) of members of the African race, who lived in a state of perpetual subordination and bondage to the continent's white inhabitants.

While conceding that the Declaration's language "would seem to embrace the whole human family," Taney nonetheless insisted that "it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration."[285] The inconsistency between the conduct of the authors of the Declaration and the great principle that "all men are created equal" was, for Taney, enough to prove that the Founders could not have meant what the plain construction of the language seemed to imply.

Curtis, I think, offered an adequate rejoinder to Taney's charge of inconsistency, though there are, no doubt, conflicting and convoluted historical sources:

> My own opinion is, that a calm comparison of these assertions of universal abstract truths, and of their individual opinions and acts, would not leave these men under any reproach of inconsistency; that the great truths they asserted on that solemn occasion, they were ready and anxious to make effectual, wherever a necessary regard to circumstances, which no statesman can disregard without producing more evil than good, would allow; and that it would not be just to them, nor true in itself, to allege that they intended to say that the Creator of all men had endowed the white race, exclusively, with the great natural rights which the Declaration of Independence asserts.[286]

Yet what is perhaps more important for this inquiry is that Curtis disavowed the relevance to the *Dred Scott* case of any such speculation over the intent of the authors of the Declaration. "As I conceive," Curtis wrote, "we should deal here not with such disputes . . . but with those substantial facts evinced by the written Constitution of States,

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[285] *Ibid.,* 407 (Taney, J.).
[286] *Ibid.,* 575 (Curtis, J. dissenting).

and by the notorious practice under them." Curtis' complaint against Taney was primarily that the Declaration was irrelevant to the construction of the legal rules at play in *Dred Scott*. If one was to inquire into whether Africans were meant, without exception, to be excluded from national citizenship, one needed only examine the constitutions and practices of the original thirteen states. "And they show," Curtis claimed, "in a manner which no argument can obscure, that in some of the original thirteen States, free colored persons, before and at the time of the formation of the Constitution were citizens of those states."[287]

McLean agreed with Curtis' historical claim that "free colored persons" were admitted to citizenship in some states at the time of the Founding, but he did not treat the historical question of state policy as solely relevant. Responding to Taney's review of pre-revolutionary state policies enacted to enlarge and protect the slave trade, McLean declared, "We need not refer to the mercenary spirit which introduced the infamous traffic in slaves, to show the degradation of negro slavery in our country." While acknowledging the operation of illiberal principles in colonial America, McLean declined to afford such principles interpretive authority. Rather, when interpreting the Constitution, McLean wrote, "I prefer the lights of Madison, Hamilton and Jay . . . than to look behind that period, into a traffic which is now declared to be piracy, and punished with death by Christian nations." And the lights of Madison, Hamilton and Jay, McLean seemed to suggest, would show that the Constitution itself was antislavery in its tendencies. "James Madison," he asserted, ". . . was solicitous to guard the language of that instrument so as not to convey the idea that there could be property in man."

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[287] *Ibid*., 575 (Curtis, J. dissenting).

Moreover, McLean observed, "In the provision respecting the slave trade, in fixing the ratio of representation, and providing for the reclamation of fugitives from labor, slaves were referred to as persons, and in no other respect are they considered in the Constitution."[288]

Within this discussion, McLean was largely silent regarding the meaning of the Declaration of Independence and its insistence that "all men are created equal." While Taney and Curtis engaged in a short dialectic concerning the intent of the Founders with respect to those Jeffersonian principles, McLean simply declared that "our independence was a great epoch in the history of freedom." In his judicial opinion, McLean did not treat the text of the Declaration as determinative of the Founders' moral understanding. Rather, he limited himself to the era surrounding the Constitution's ratification, and he took for granted what Hadley Arkes has described as "the principles of natural right that stood behind the Constitution, and guided even its compromises."[289] McLean found evidence of the Founders' moral understanding in the "well-known fact that a belief was cherished by leading men, South as well as North, that the institution of slavery would gradually decline until it would become extinct."[290] While there were certainly historical elements at work during and before the Founding era that were opposed to the liberal principles championed by McLean, he insisted that a principled preference for historical

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[288] *Ibid.,* 537 (McLean, J. dissenting).

[289] Hadley Arkes, "Natural Law and the Law: An Exchange," *First Things*, May 1992, 48.

[290] Cf. Lincoln's argument that behind the constitutional compromises with the slave interest was the intention of the framers to place slavery on a path toward ultimate extinction: "I entertain the opinion upon evidence sufficient to my mind, that the fathers of this government placed that institution where the public mind did rest in the belief that it was in the course of ultimate extinction. Let me ask why they made provision that the source of slavery—the African slave trade—should be cut off at the end of twenty years? Why did they make the provision that in all the new territory we owned at that time slavery should be forever inhibited? Why stop its spread in one direction and cut off its source in another, if they did not look to its being placed in the course of ultimate extinction?" Lincoln's speech at Alton in *Lincoln-Douglas Debates*, 384. Cf. Lincoln's speech at Chicago, *Lincoln-Douglas Debates*, 33 and Lincoln's speech at Charleston, *Lincoln-Douglas Debates*, 270.

sources that embody true principles of right was hermeneutically legitimate: "[I]f we are to turn our attention to the dark ages of the world, why confine our view to colored slavery? On the same principles, white men were made slaves. All slavery has its origin in power, and is against right."[291]

Within McLean's opinion, the *telos* of the American regime, in opposition to the opinions of both Taney and Curtis, was to be understood in terms of justice. Yet McLean was the inheritor of an American legal tradition that discounted "[t]he notion that out beyond [the posited law] lay a higher law to which the judge *qua* judge was responsible."[292] As a matter of social fact, McLean conceded, slavery was sanctioned by the laws of the states, and the right to own property in a slave was protected by the municipal regulations of various jurisdictions within the United States. The Court, therefore, ought not to have pronounced illegal what was "unquestionably" a legally established institution. But where there was a conflict of law situation or where the applicable legal rules were ambiguous, McLean's opinion seemed to suggest that a judge might properly maintain a preference for what is just. Viewed within the "intellectual milieu that accepted the natural law tradition on slavery," McLean's jurisprudence may fitly be described as insisting that "[s]lavery has no source in right, and the ultimate end (*telos*) of the law ought to be liberty."[293] When coupled with a commitment to judicial positivism, such a jurisprudence could not, by itself, decide any particular point of law; but such a jurisprudence, anchored in the tradition of natural law, nevertheless did breathe life into the judicial enterprise by recognizing an end or aspiration toward which it could strive. Soon after the *Dred Scott* ruling, such a theory of constitutional aspiration

[291] *Dred Scott* at 538 (McLean, J. dissenting).
[292] Cover, *Justice Accused*, 29.
[293] *Ibid*., 30.

was taken up by Lincoln in the Senate campaign of 1858, where the principle issue in contention was slavery in the territories and the soundness of the *Dred Scott* decision.

Constitutional Aspirations in the Lincoln-Douglas Debates

"The long political duel between Stephen A. Douglas and Abraham Lincoln," observes Harry Jaffa, "was above all a struggle to determine the nature of the opinion which should form the doctrinal foundation of American government."[294] This struggle was principally concerned with the meaning and purpose of the proposition "all men are created equal," and Lincoln, no less than Douglas, centered the debate on the opinions expressed in *Dred Scott*. As Jaffa notes, "For Lincoln there was, indeed, 'only one issue,' but that issue was whether or not the American people should believe that 'all men are created equal' in the full extent and true significance of that proposition."[295] For Douglas, however, the central issue in the debate with Lincoln concerned the right of the people to maintain popular sovereignty over their own domestic institutions, including the institution of slavery: Douglas famously asserted his own indifference to whether or not slavery was voted up or down in a given community. But in so making popular sovereignty the central issue, Douglas was forced to deny explicitly the Lincolnian interpretation of the Declaration's meaning and significance.

The *telos* of the American regime was, for Douglas, the "great principle of self-government, which asserts the right of every people to decide for themselves the nature

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[294] Harry V. Jaffa, *Crisis of the House Divided: An Interpretation of the Issues in the Lincoln-Douglas Debates*, University of Chicago Press Edition, (Chicago: University of Chicago Press, 1982), 308.
[295] Jaffa, *Crisis of the House Divided*, 309.

and character of the domestic institutions and fundamental law under which they are to live."[296] As David Zarefsky aptly notes, "Douglas . . . was not an amoral man. Rather, his highest moral value was procedural: the principle of local self-government, the right of each community to make its own decisions about its domestic affairs."[297] Yet in conceding that slavery was a matter reasonably resolved by the democratic process—and in expressing his "don't care" policy as to whether or not slavery was voted up or down—Douglas had to deny the full extent of the Declaration's insistence on human equality. "The signers of the Declaration of Independence," declared Douglas, "never dreamed of the negro when they were writing that document. They referred to white men, to men of European birth and European decent, when they declared the equality of all men."[298] Douglas did not go so far as to defend slavery as morally right; but he did find refuge for his position in asserting that neither the Declaration of Independence nor the great principle of self-governance declared it to be wrong. For Douglas, "[m]oral judgment of the slaveholders was not a subject for political debate but was a matter for their consciences and their God."[299]

Lincoln accused Douglas of inconsistently claiming that slavery could rightfully be voted up or down in a community, regardless of the moral status of slavery itself: "When Judge Douglas says that whoever, or whatever community, wants slaves, they

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[296] Douglas' speech at Galesburg in *Lincoln-Douglas Debates,* 288.

[297] David Zarefsky, foreword to *Lincoln-Douglas Debates*, xv.

[298] Douglas' speech at Galesburg in *Lincoln-Douglas Debates*, 294.

[299] Zarefsky, foreword to *Lincoln-Douglas Debates*, xvi. See, for example, Douglas' speech at Quincy: "I hold that the people of the slaveholding states are civilized men as well as ourselves, that they bear consciences as well as we, and that they are accountable to God and their posterity and not to us. It is for them to decide therefore the moral and religious right of the slavery question for themselves within their own limits . . . I repeat that the principle is the right of each state, each territory, to decide this slavery question for itself, to have slavery or not, as it chooses, and it does not become Mr. Lincoln, or anybody else, to tell the people of Kentucky that they have no consciences, that they are living in a state of iniquity, and that they are cherishing an institution to their bosoms in violation of the law of God. Better for him to adopt the policy 'judge not lest ye be judged'" (351).

have a right to have them, he is perfectly logical if there is nothing wrong in the institution; but if you admit that it is wrong, he cannot logically say that anybody has a right to do a wrong."[300] While conceding that democratic self-governance was one of the great principles of the American regime, Lincoln declared that the principles of the Declaration anteceded the Constitution and were "the principles and axioms of a free society."[301] And yet, Lincoln later reflected, the principles of the Declaration were "denied and evaded, with small show of success. One dashingly calls them 'glittering generalities'; another bluntly calls them 'self-evident lies'; and still others insidiously argue that they apply only to 'superior races.'"[302]

In the Lincolnian interpretation, the Declaration declared that all men, without exception, were created equal, and the Founders intended to assert that proposition in its most expansive meaning and significance. Nonetheless, for Lincoln, the real issue at stake in the debate over territorial expansion and slavery—a debate centered on the opinions in the *Dred Scott* case—was whether or not slavery was intrinsically right.

> You may turn over everything in the Democratic policy from beginning to end, whether in the shape it takes on the statute book, in the shape it takes in the *Dred Scott* decision, in the shape it takes in conversation or the shape it takes in short maxim-like arguments—it everywhere carefully excludes the idea that there is anything wrong in it.
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> That is the real issue. That is the issue that will continue in this country when these poor tongues of Judge Douglas and myself shall be silent. It is the eternal struggle between these two principles—right and wrong—throughout the world. They are the two principles that have stood face to face from the beginning of time; and will ever continue to struggle.[303]

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[300] Lincoln's speech at Quincy in *Lincoln-Douglas Debates*, 334.

[301] Abraham Lincoln, "The Principles of Jefferson: Letter to Henry L. Pierce and Others," April 6, 1859. In *Abraham Lincoln: A Documentary Portrait Through His Speeches and Writings*, ed., Don E. Fehrenbacher (Stanford: Stanford University Press, 1964), 120.

[302] Lincoln, "The Principles of Jefferson," 120.

[303] Lincoln's speech at Alton in *Lincoln-Douglas Debates*, 393.

While slavery was legally established by local legislation, still it was contrary to right, and it was contrary to the Jeffersonian axioms declared by the Declaration of Independence, which undergirded the logic of the constitutional text.[304] "Let us turn slavery from its claims of 'moral right,'" declared Lincoln, "back upon its existing legal rights, and its arguments of 'necessity.' Let us return it to the position our fathers gave it; and there let it rest in peace. Let us readopt the Declaration of Independence, and with it, the practices, and the policy, which harmonize with it."[305] In Lincoln's interpretation, the Declaration of Independence and the Constitution of the United States—that "great charter of liberty"—were understood as incorporating enduring principles of justice that were substantively true even when they were existentially denied.[306] Or, to bring the point back to the *Dred Scott* case, the reason why the "judges were tragically mistaken," as Gary Jacobsohn argues, ". . . [was] precisely because they did not take the Constitution seriously; that is, they failed to acknowledge the moral dimensions of American

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[304] Lincoln on the relevant clauses in the Constitution: "Again; the institution of slavery is only mentioned in the Constitution of the United States two or three times, and in neither of these cases does the word 'slavery' or 'negro race' occur; but covert language is used each time, and for a purpose full of significance. . ." [Lincoln goes on to discuss the language used in the 1808 Clause, the 3/5 Clause, and the Fugitive Slave Clause] ". . . And I understand the contemporaneous history of those times to be that covert language was used with a purpose, and that purpose was that in our Constitution, which it was hoped and is still hoped will endure forever—when it should be read by intelligent and patriotic men, after the institution of slavery had passed from among us—there should be nothing on the face of the great charter of liberty suggesting that such a thing as negro slavery had ever existed among us." See Lincoln's speech at Alton in *Lincoln-Douglas Debates*, 384-385.

[305] Lincoln's speech at Peoria. Quoted in Paul M. Angle, Introduction to *Lincoln-Douglas Debates*, xxv.

[306] Lincoln's speech at Springfield in *Lincoln-Douglas Debates*, 379: "I think the authors of that notable instrument intended to include all men, but they did not mean to declare all men equal in all respects. They did not mean to say all men were equal in color, size, intellect, moral development or social capacity. They defined with tolerable distinctness in what they did consider men created equal—equal in certain inalienable rights, among which are life, liberty and the pursuit of happiness. This they said, and this they meant. They did not mean to assert the obvious untruth, that all men were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. They mean simply to declare the right so that the enforcement of it might follow as fast as circumstances should permit."

constitutionalism."[307] The failure of the judges in this regard became most explicit within the discussion of property rights and the requirements of the Fifth Amendment.

SLAVERY AND THE FIFTH AMENDMENT

The Fifth Amendment stipulates that the Federal Government shall not deprive anyone of "life, liberty, or property without due process of law." In his opinion, Chief Justice Taney argued that the *due process* clause contained a substantive component, which ensured that a man may not be deprived of his property in slaves while entering the federal territories. McLean and Lincoln both interpreted this provision as including a substantive component as well, yet the emphasis in their exegesis was not on the words *due process* so much as it is on the word *property*. According to both McLean and Lincoln, the Constitution presupposed a distinction between species of things that could be held *rightfully* as property and species of things—including rational beings—that could not be held *rightfully* as property and which might only be held as such under a regime of local positive legislation.[308] In other words, it mattered immensely what was the substantive nature of the property being claimed for protection under the Fifth Amendment.

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[307] Gary J. Jacobsohn, *The Supreme Court and the Decline of Constitutional Aspiration* (Totowa, NJ: Rowan & Littlefield Publishers, 1986), 8.

[308] Cf. U.S. Constitution, Art. 4 § 2: "No person held to service or labor in one State *under the laws therof* . . ." [emphasis mine].

Nature and Property in *Dred Scott*

After discussing the nature of the federal government as a government of limited and enumerated powers, Chief Justice Taney declared:

> These powers, and others, in relation to rights of person, which it is not necessary to enumerate here, are, in express and positive terms, denied to the General Government; and the rights of private property have been guarded with equal care. Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.[309]

In his treatment of Taney's Fifth Amendment argument, Curtis took the position that the Constitution granted to the Federal Government the authority to enact general legislation respecting the territories. Because the Constitution was devoid of any specific provisions *protecting* slavery in the territories, it was reasonable to conclude that Congress had the power under the "needful rules and regulations" clause to limit or sanction slavery rights as it saw fit. The legal issue for Curtis, then, was whether

> . . . it can be shown, by anything in the Constitution itself, that when it confers on Congress the power to make all needful rules and regulations respecting the territory belonging to the United States, the exclusion or the allowance of slavery was excepted; or if anything in the history of this provision tends to show that such an exception was intended by those who framed and adopted the Constitution to be introduced into it; [and if it can] I hold it to be my duty carefully to consider, and to allow just weight to such considerations in interpreting the positive text of the Constitution. But where the Constitution has said all needful rules and regulations, I must find something more than theoretical reasoning to induce me to say it did not mean all.[310]

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[309] *Dred Scott* at 450 (Taney, J.).
[310] *Dred Scott* at 621 (Curtis, J. dissenting).

Concerning the guarantee against deprivation of property without due process of law, Curtis noted that this guarantee was based on Magna Charta and that prohibitions and restrictions on rights to certain species of property had been entertained by England as well as by all of the state legislatures (whose state constitutions also incorporated Magna Charta) and by the national legislature through the passage of the Northwest Ordinance and the Missouri Compromise. If the Founders intended to declare through the Fifth Amendment such a vested right to property in a slave, it was the first time that their intention has been so declared, and, if nothing else, custom had abolished whatever theoretical protection the Constitution gave to an individual's right to bring slaves into the territories.[311]

As Mark Graber notes, Curtis "implicitly denied the constitutional right to bring personal property into the territories by treating persons seeking to bring slaves into the territories as demanding a special 'exception.'"[312] McLean, however, disagreed with Curtis over "whether persons had a constitutional right to bring personal property into the territories"; and, according to Graber, McLean "disputed Taney's conclusion only because the Ohio justice maintained that 'a slave is not mere chattel.'"[313] Graber's characterization of McLean's position on this point is perhaps uncharitable; while McLean certainly did maintain that "a slave is not mere chattel," he also based his argument against slavery in the territories on a nuanced understanding of the nature of the powers of the federal government and the nature of the right in question. "By virtue of

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[311] *Ibid.,* 627 (Curtis, J. dissenting). Curtis: "I think I may at least say, if the Congress then did violate Magna Charta by the ordinance, no one discovered that violation. Besides, if the prohibition upon all persons, citizens as well as others, to bring slaves into a Territory, and a declaration that if brought they shall be free, deprives citizens of their property without due process of law, what shall we say of the legislation of many of the slaveholding States which have enacted the same prohibition?"

[312] Graber, *Dred Scott and the Problem of Constitutional Evil*, 61.

[313] *Ibid*., 62.

what law is it," McLean asked, "that a master may take his slave into free territory, and exact from him the duties of a slave? The law of the Territory does not sanction it. No authority can be claimed under the Constitution of the United States, or any law of Congress."[314] In making this argument, McLean implicitly sided with Taney that the federal government did not possess the authority to wantonly prohibit any property whatever from entering into the federal territories, and, as Graber suggests, part of the reason for his disagreement with Taney was his conviction that there was no rightful claim to property in another man because a man, by nature, was not "mere chattel." But McLean also appealed to the Constitution, to the state policies of Missouri and Illinois, to the common law, to international law, and to legal precedent in Britain and America, before he asked, "Will it be said that the slave is taken as property, the same as other property which the master may own? To this I answer, that colored persons are property by the law of the State, and no such power has been given to Congress."[315]

On this point, Curtis was agreed: "The constitution refers to slaves as 'persons held to service in one State, under the laws therof.' Nothing can more clearly describe a *status* created by municipal law . . . [and this court has declared in *Prigg v. Pennsylvania* that] 'The state of slavery is deemed to be a mere municipal regulation, founded on and

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[314] *Dred Scott* at 548 (McLean, J. dissenting).

[315] *Ibid.,* 548 (McLean, J. dissenting). Cf. Lincoln at Charleston in *Lincoln-Douglas Debates*, echoing McLean's argument that a slave is not to be regarded in the same class as other 'common matters of property': "The other way is for us to surrender and let Judge Douglas and his friends have their way and plant slavery over all the state—cease speaking of it as in any way a wrong—regard slavery as one of the common matters of property, and speak of negroes as we do of our horses and cattle" (270). Cf. Lincoln's speech at Quincy, ibid., against Douglas' characterization of the nature of this property: "When he says that slave property and horse and hog property are alike to be allowed to go into the territories, upon the principles of equality, he is reasoning truly, if there is no difference between them as property; but if the one is property, held rightfully, and the other is wrong, then there is no equality between the right and the wrong; so that, turn it any way you can, in all the arguments sustaining the Democratic policy, and in that policy itself, there is a careful, studies exclusion of the idea that there is anything wrong in slavery" (334-335).

limited to the range of territorial laws.'"[316] In their characterizations of the legal status of slavery, Curtis and McLean drew upon "the understandings that ran back to the classic teachers of jurisprudence, on the difference between the natural law and the 'municipal,' or the positive law (the law that was posited, or set down, in a particular place)."[317] McLean's dispute with Curtis, then, was a dispute over the breadth and scope of the positive grant of power to the federal government. As a government of limited and enumerated powers, McLean argued, the federal government no more had the authority to prohibit slavery in local jurisdictions than it did to introduce slavery into federal jurisdictions. The "needful rules and regulations" clause did not abolish other constitutional restrictions that might be placed on the federal government by the text and design of the Constitution. According to McLean, it was the locality and artificiality of slavery ordinances—rather than the general power of the federal government—that legitimized the Northwest Ordinance and the Missouri Compromise.[318]

To claim for the federal government such a sweeping grant of power over property rights would have, for McLean, ran counter to his understanding of the limited nature of the power conferred upon the federal government and would have frustrated the design and spirit of the Constitution. In the majority opinion, it was "said [that] the Territories are common property of the States, and that every man has a right to go there

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[316] *Ibid*., 624 (Curtis, J. dissenting).

[317] Hadley Arkes, *Beyond the Constitution* (Princeton: Princeton University Press, 1990), 44.

[318] See Michael Zuckert, "Legality and Legitimacy in *Dred Scott*: The Crisis of the Incomplete Constitution," *Chicago-Kent Law Review* (2007) 82:291-328. Zuckert argues that McLean's denial of the constitutional authority of the federal government to make slaves was an implicit denial of the constitutionality of the Missouri Compromise. I do not think this is McLean's claim, but Zuckert raises a strong point: If slavery can be established only by local law—and if Congress makes all "needful rules and regulations" for the territories—then it seems to follow that Congress has no authority to strike a compromise that would maintain a system of slavery in *some* of the federal territories.

with his property." In McLean's dissent, "This is not controverted."[319] At the same time, McLean suggested that failure to discriminate between legitimate and illegitimate property would equally frustrate the design and spirit of the Constitution, for "property in a human being does not arise from nature or from the common law"; and the "Constitution, in express terms, recognizes the status of slavery as founded on the municipal law."[320] However, according to McLean, the majority opinion in *Dred Scott* asserted to the contrary that a slave was a common article of chattel—the same as "a horse, or any other kind of property"—and that each citizen had a right to bring his slave into the federal territories. McLean disagreed, but if a jurist was to discriminate between legitimate and illegitimate species of property, the question properly arose how one is to make such a distinction. Insomuch as there was any ambiguity or conflict in what the law might require, the answer for McLean, like Hamilton in a different context, was to be found in the "nature and reason of the thing."[321]

As previously noted, Graber asserted that McLean disagreed with Taney's due process argument "only" because McLean "maintained that 'a slave is not mere chattel.'"[322] Graber is dismissive of this argument; but, like Lincoln, McLean thought it

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[319] *Dred Scott* at 549 (McLean, J. dissenting).

[320] *Ibid*., 549 (McLean, J. dissenting). McLean, referring to the U.S. Constitution, Art. 4 § 3: "'No person held to service or labor in one State, under the laws thereof, escaping into another, shall' &c."

[321] *The Federalist: A Commentary on the Constitution of the United States*, ed., Robert Scigliano (New York: Random House, 2000), 499. Hamilton in Federalist No. 78, speaking of the Federal Judiciary: "The exercise of judicial discretion, in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is, that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing."

[322] Graber, *Dred Scott and the Problem of Constitutional Evil*, 62.

mattered immensely "whether a negro is *not* or *is* a man." Lincoln declared in his speech at Peoria, within the context of the debate over popular sovereignty in the territories, that "[i]f [the slave] is not a man, why in that case, he who is a man may, as a matter of self-government, do just as he pleases with him. But if the negro *is* a man, is it not to that extent, a total destruction of self-government, to say that he too shall not govern *himself*?"[323] McLean asked this same question within the context of *Dred Scott*: If there was some property right that attached to a man *qua* man (i.e., in the absence of local legislation), then was it not a total destruction of property rights if the property itself was a man? For McLean, there could be no doubt as to the humanity of the slave, for "He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence."[324] Within the natural law tradition that McLean so heavily drew upon, as Arkes rightly notes, it was a common understanding that "human beings did not deserve to be ruled in the way that humans ruled dogs, horses, and monkeys. Creatures who could give and understand reasons deserved to be ruled through the giving of reasons, by a government that would seek the consent of the governed."[325] It was part of the nature and reason of the thing that a being "amenable to the laws of God and man"—a creature, in other words, that could give and understand reasons—was not "merely chattel." Whatever abstract property rights were presupposed by the Fifth Amendment, the right to own another man could not, by its very nature, have been among them.

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[323] Roy P. Basler, ed., *The Collected Works of Abraham Lincoln,* 9 vols. (New Brunswick, NJ: Rutgers University Press, 1953), 2:265-66. Quoted in Arkes, *Beyond the Constitution*, 43.

[324] *Dred Scott* at 549 (McLean, J. dissenting).

[325] Arkes, *Beyond the Constitution*, 43.

Nature and Property in the Lincoln-Douglas Debates

Upon the question of vested property rights is perhaps where there was the greatest divergence between Douglas' insistence on the principle of popular sovereignty and Taney's declared "right to property in a slave." For if the Constitution protected slave property in the federal territories, slavery would have ceased to be a local institution. Douglas' solution to this problem was to declare the right of local communities to nullify the Court's decision by failing to provide legislation that would protect this particular type of property. When recast in this light, Lincoln charged, Douglas' interpretation of the *Dred Scott* decision became "the strongest abolition argument ever made."[326] If one was to argue that a right, enshrined in the Constitution, could be disregarded by local communities, then one could not "avoid furnishing an argument by which Abolitionists may deny the obligation to return fugitives, and claim the power to pass laws unfriendly to the right of the slaveholder to reclaim his fugitive."[327] When the principles of Douglas' argument were applied in this way, Lincoln asserted, there had "never been as outlandish or lawless a doctrine from the mouth of any respectable man on earth."[328]

For Lincoln, the relevant question was whether or not the Court had decided *correctly* in *Dred Scott*; whether or not there was, in fact, a constitutional right to own another man. Lincoln intended to exploit the contradictory principles championed by Douglas (i.e., popular sovereignty in the territories *and* adherence to the Supreme Court's decision in *Dred Scott*), and he did so by emphasizing the nature of the right in question

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[326] Lincoln's speech at Alton in *Lincoln-Douglas Debates*, 395.
[327] *Ibid*., 395.
[328] *Ibid*., 394.

and by denying the persuasiveness of the Supreme Court's reasoning in the case. As Lincoln made clear, he believed "that the Supreme Court and the advocates of that decision might search in vain for the place in the Constitution where the right of property in a slave is distinctly and expressly affirmed."[329] But upon the question of the federal government's general power to curtail property rights in the territories, Lincoln sided with McLean over Curtis. The federal government did not possess an unlimited grant of power under the "needful rules and regulations" clause, and the nature of the property in question was wholly relevant to the legal discussion in *Dred Scott*: "When [Judge Douglas] says that a slave property and horse and hog property are alike to be allowed to go into the territories, upon the principles of equality, he is reasoning truly, if there is no difference between them as property; but if the one is property, held rightfully, and the other is wrong, then there is no equality between the right and the wrong . . . ."[330]

Like McLean, the reason Lincoln declared that a slave was not among that species of property "held rightfully" was because of his consideration of the nature and reason of the thing in question. The spirit that said to another man, "You work and toil and earn bread, and I'll eat it," Lincoln argued, was based upon a tyrannical principle "[n]o matter in what shape it comes, whether from the mouth of a king who seeks to bestride the people of his own nation and live by the fruit of their labor, or from one race of men as an apology for enslaving another race."[331] While the Founders of the American government intended to place slavery on a course toward ultimate extinction and the Constitution itself neither distinctly nor expressly affirmed the right to hold property in men, the "real issue in this controversy—the one pressing upon every mind—is the sentiment on the

[329] Lincoln's speech at Galesburg in *Lincoln-Douglas Debates*, 309.
[330] Lincoln's speech at Quincy in *Lincoln Douglas Debates*, 334-335.
[331] Lincoln's speech at Alton in *Lincoln-Douglas Debates*, 393.

part of one class that does look upon [slavery] *as a wrong*, and another class that *does not* look upon it as a wrong."[332] While such moral considerations were subject to the charge of "abstract reasoning," the thing at stake in this controversy, according to Lincoln, was "rather *concrete* than *abstract*."[333] Lincoln, no less than McLean, would have agreed with the assessment made by Jaffa a century later that the "attempt to legitimize the extension of slavery was impossible without denying the Negro's humanity or without denying the moral right of humanity or both."[334] And McLean, no less than Lincoln, thought that the illiberal principles behind the slave interest were too heavy for the Constitution to bear.

Dred Scott and the Jurisprudence of John McLean

The reason McLean supported fidelity to the Constitution, even when the law was unambiguous in its accommodation of what was unjust, such as in the fugitive slave clause, was because of his conviction that the Constitution was essentially antislavery. In other words, fidelity to law was, for McLean, a moral consideration; the reason it was his duty to support the Constitution was because the Constitution incorporated moral understandings that were substantively just. McLean found evidence for this in the text of the document, but his reading of that text was informed by a moral understanding that anteceded the Constitution; an understanding, shared by Lincoln, that

> [t]he ground of right and wrong . . . in regard to slavery, could not depend on any moral judgments stipulated in the Constitution. The wrongness of slavery was rooted in the understandings of right and wrong that *preceded* the Constitution. Indeed, as Lincoln recognized, the right of human beings

[332] *Ibid*., 390.
[333] Lincoln's speech at Springfield in *Lincoln-Douglas Debates*, 79-80.
[334] Jaffa, *Crisis of the House Divided*, 313.

> to be ruled only with their own consent was a necessary part of that moral ground on which the Constitution was founded.[335]

McLean, like Lincoln, withheld his support from the majority's decision in *Dred Scott* partly because he perceived that the decision ran counter to the moral understandings that undergirded American constitutionalism.

Nonetheless, the legal issues at stake in the *Dred Scott* decision are multi-tiered, and there are many facets that run beyond a simple consideration of justice. I do not intend to suggest that McLean reduced the legal question (merely) to a question of justice or injustice, policy or impolicy. The authority and jurisdiction of the Supreme Court, considerations of federalism and the separation of government powers, the legal and moral obligation of fidelity to law, constitutional design and the ground of constitutional rights, the scope of congressional power, the status of the federal territories, and the intent of the Framers with regard to territorial expansion are all questions that could not be answered merely by an appeal to simple justice. Yet while substantially agreeing with Curtis on many of the legal questions at issue in *Dred Scott*, McLean's jurisprudence was unique in that it undertook a serious consideration of the nature of law, constitutional aspirations, and property rights within the context of the humanity of the slave. While Curtis tendered a powerful dissent in *Dred Scott,* particularly with respect to the historical materials put forward by Taney, McLean challenged Curtis' opinion by incorporating a style of legal reasoning that was seemingly out of vogue on the High Court in 1857.

[335] Arkes, *Beyond the Constitution*, 44.

Dred Scott and American Constitutionalism Today

Contemporary constitutional jurisprudence suffers from a dilemma that was foreshadowed by the *Dred Scott* case. In *The Supreme Court and the Decline of Constitutional Aspiration*, Jacobsohn questions what modern relevance is to be found in the eighteenth century idea of "inalienable rights," once the intellectual status of that doctrine is held in disrepute.[336] Similarly, Jaffa made this observation at the centennial of the Lincoln-Douglas debates:

> Modern social science appears to know neither God nor nature. The articulation of the world, in virtue of which it is a world and not undifferentiated substratum, has disappeared from view. The abolition of God and nature has therefore been accompanied by the abolition of that correlative concept, man, from this same world.[337]

Modern commentary on the *Dred Scott* decision particularly is affected by this dilemma. For if man is a non-teleological being, then the nature of man ceases to bear any jurisprudential relevance. The law is not made for man, because man himself is not made for anything. There is a radical cognitive separation between what the law requires and what the law *ought* to require, because, strictly speaking, the realm of *ought* exists as mere feeling or value and not as fact. The contemporary legal community has ever felt the holding of *Dred Scott* to be odious, but modern commentators seek to ground their opposition in something more concrete than personal distaste. This may explain, in part, why modern schools of jurisprudence are quick to claim Curtis—who devoted much of his opinion to debunking Taney's history—as their legitimate precursor. Keith Whittington laments that the road not taken in *Dred Scott* was the road offered by Justice

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[336] Jacobsohn, *The Supreme Court and the Decline of Constitutional Aspiration*, 2.
[337] Jaffa, *Crisis of the House Divided*, 11.

Curtis' dissent.[338] Jack Balkin asserts, "The appropriate rejoinder [to Taney's substantive due process argument] is Justice Curtis's in his dissent in *Dred Scott*."[339] Robert Bork writes that "Justice Benjamin Curtis of Massachusetts dissented in *Dred Scott*, destroyed Taney's reasoning, and rested his own conclusions upon the original understanding of those who made the Constitution."[340] Christopher Eisgruber, responding to Bork's claim that Curtis is the original originalist, attempts to claim Curtis as a "fundamental values" jurist.[341] Yet all of these appeals to Curtis' dissent have in common a rejection of the eighteenth century natural rights tradition.[342]

McLean's dissent in *Dred Scott* can at least be viewed as one instantiation of an older understanding. Instead of drawing such a stark distinction between what is "political rather than legal," as many of McLean's detractors have been tempted to do, perhaps his dissent is better perceived in light of Lincoln's subsequent arguments on this very subject. For in the senatorial debates between Lincoln and Douglas, Lincoln insisted that the "real issue" with the democratic policy "in the shape it takes in the *Dred Scott* decision . . . [is that it] carefully excludes that there is anything wrong in [slavery]."[343] As

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[338] See Keith E. Whittington, "The Road Not Taken: Dred Scott, Judicial Authority and Political Questions," *The Journal of Politics* (2001) 63(2):365-391.

[339] J.M. Balkin, "Dred Scott and Kelo," (August 11, 2005). http://www.balkinization.com. (accessed May 14, 2008).

[340] Robert H. Bork, *The Tempting of America*: *The Political Seduction of the Law* (Free Press, 1990), 33.

[341] See Christopher L. Eisgruber, "Dred Again: Originalism's Forgotten Past," *Constitutional Commentary*, Vol. 10, No. 31 (1993). Eisgruber is sympathetic to arguments based on natural law, and he attributes more natural law legal reasoning to Curtis' opinion than I do. Nonetheless, within a discussion of Joseph Story on natural law and property rights, Eisgruber indicates that the "out-moded language of natural law," the "rhetoric of natural rights," and "the Declaration's references to a 'Creator'" are superfluous and unnecessary to a modern aspirational and justice-seeking constitutionalism (44).

[342] See Sanford Levinson, "Slavery in the Canon of Constitutional Law," in *Slavery and the Law*, ed., Paul Finkelman (Madison: Madison House, 1992). "If one wishes to attack Dred Scott, therefore, an obvious question is whether one must go after Taney's originalist modality or, instead, after his specific historical analysis. Many students, for example, endorse Justice's Curtis's dissent, which attacks Taney's history. I ask them if this means they would in fact support Taney if further historical research called Curtis's assertion into question and supported Taney's account instead" (103).

[343] Lincoln's speech at Alton in *Lincoln-Douglas Debates*, 390.

Jaffa argues, the question at the heart of *Dred Scott* was the question "which took precedence when a slave owner entered a Territory with his slave, the Negro slave's human personality, under 'the laws of nature and nature's God,' or his chatteldom, under the laws of the slave state whence he came."[344] And speaking to that issue, McLean responded relevantly that the slave, by his very nature, was not "mere chattel."

There is another modern challenge to McLean's jurisprudence, however, that consists in an accusation that (whether right or wrong about the Constitution) McLean imprudently exacerbated the sectional conflict brewing over the expansion of slavery in the territories. An early version of this thesis was proffered in the 1920's by the historian Frank Hodder and has been repeated, in various forms, in modern literature. According to Hodder, the question of the constitutionality of the Missouri Compromise was a question that the Court did not originally intend to answer.[345] Rather, Hodder maintained, the Court was forced into a discussion of that piece of congressional legislation by the dissenters, and particularly McLean, who was "blinded by political ambition."[346]

Regarding the Court's original intention to leave the Missouri Compromise unaddressed, Robert McCloskey similarly argued,

> . . . at least one judge, McLean, was dissatisfied with this prudent arrangement. It became known that he, an ambitious politician and a firm abolitionist, intended to dissent, arguing that Scott became free when he entered the free territory of the Louisiana Purchase. This necessarily involved the contention that Congress had the power to enact the Missouri Compromise which had made that area free. A majority of his fellow judges believed in fact that the Compromise was invalid, and they were

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[344] Harry V. Jaffa, *Original Intent and the Framers of the Constitution: A Disputed Question* (Washington, DC: Regnery Gateway, 1994), 68.

[345] F.H. Hodder, "Some Phases of the Dred Scott Case," The Mississippi Valley Historical Review, Vol. 16, No. (June 1929), 3-22.

[346] *Ibid*., 22.

> unwilling to let McLean go unanswered, if the question was to be posed at all.[347]

Moreover, the controversial *Dred Scott* decision, it was suggested, paved the way for the subsequent split in the Democratic Party that allowed the election of Lincoln and hastened the coming of the Civil War. Under this assumption, Hodder maintained that

> . . . the only chance of averting [war] lay in the election of [Stephen] Douglas by a united party and the adoption of a new compromise which would have tided over the crisis until a larger degree of intercommunication and a better understanding between the sections had rendered possible a peaceful solution to the problem of slavery.[348]

More recently, Graber has argued that a better constitutional choice for men of antislavery sentiments may have been to "accommodate more evil than constitutionally necessary in order to maintain constitutional conversations, however truncated, that over time *might* have realized a more just society."[349] Graber, however, identifies John Bell, rather than Stephen Douglas, as the likely candidate of constitutional peace.[350] According to each account, the antislavery jurist McLean, like the antislavery politician Lincoln—while well-meaning and perhaps correct as a matter of simple justice—was woefully misguided as a matter of statesmanship, desiring a just peace in theory while in fact hastening the scourge of war.

A serious reconsideration of McLean's opinion amidst these contemporary challenges, then, points also to a reconsideration of the theoretical grounds of Lincoln's antislavery constitutionalism and Lincoln's subsequent reflections on both the necessity and limits of extra-judicial constitutional statesmanship. In the following chapter, I take

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[347] Robert McCloskey, *The American Supreme Court*, 62.

[348] Hodder, "Some Phases of the Dred Scott Decision," 21.

[349] Graber, *Dred Scott*, 253.

[350] Douglas is problematic as a candidate for constitutional peace, according to Graber, because his approval of the theory of Manifest Destiny would have led to a foreign "war for the immediate purpose of expanding slavery." See Graber, *Dred Scott and the Problem of Constitutional Evil*, 240.

note of two important iconoclastic treatments of Lincoln by Mark Brandon and Mark Graber, respectively, and I argue that these accounts are a-historical, and even anachronistic, despite their attempts to operate within the terms of American political thought and debate in the nineteenth-century. The anachronism, I suggest, consists chiefly in their lack of engagement with both Lincoln's natural law arguments and his self-conscious interpretation of his own statesmanship in providential terms. Within the context of Lincoln's opposition to the *Dred Scott* opinion and his moral engagement with the costs of the Civil War, the natural law and providential aspects of Lincoln's thought shed light on the massive gulf between the underlying premises of modern constitutional theory and the tradition of American antislavery constitutionalism.

Chapter 5: Providence and the Limits of Constitutional Statesmanship

The degree to which modern constitutional theory is deeply uncomfortable with the constitutional teleology and political theology of the antislavery constitutional tradition is evidenced by recent works challenging the received wisdom that Lincoln exercised great constitutional statesmanship during the aftermath of the *Dred Scott* decision. Mark Brandon and Mark Graber, in particular, have each offered iconoclastic treatments of Lincoln that display a certain reticence about heaping praise upon Lincoln's natural law constitutionalism.[351] Brandon, for his part, provides a typology for constitutional failure which jettisons reliance on any transcendent or normatively justifying principles external to a written constitution itself. Graber, in a different vein, urges us to rethink the tradeoffs, relative to the institution of slavery, between constitutional peace and constitutional evil. Each work employs a neo-Hobbesian framework that implicates broad questions regarding a) Lincoln's statesmanship in terms of his public criticism of the *Dred Scott* decision and b) Lincoln's moral engagement with the tragedy of the Civil War.

In assessing these two aspects of Lincoln's statesmanship, I suggest in this chapter that we ought to take Lincoln's deep attachment to natural law, as well as his interpretation of the war in providential terms, far more seriously than we are inclined to do in our retrospective evaluations. What then emerges is not a picture of an individual willing to recklessly gamble away peace but a statesman operating within the confines of

[351] Mark Brandon, *Free in the World: American Slavery and Constitutional Failure* (Princeton: Princeton University Press, 1998); Mark Graber, *Dred Scott and the Problem of Constitutional Evil* (Cambridge University Press, 2006).

human knowledge and trusting, ultimately, that human events are purposeful and that the universe in which they occur is providentially ordered. If Lincoln's interpretation of the thing at stake in *Dred Scott* was correct, moreover, then a failure of members of the other branches of government to challenge the constitutional principles of the Court's decision would have amounted to an acquiescence in the destruction of republican government at the hands of the judiciary. But Lincoln's interpretation of the crisis that erupted after the *Dred Scott* decision requires a certain theoretical orientation that has been rejected by modern constitutional theorists, and this rejection makes a reconsideration of Lincoln in light of contemporary challenges to the standard Lincoln hagiography particularly important. In the following section, I describe Lincoln's response to *Dred Scott v. Sandford* during the political aftermath of that decision before turning to a discussion of the challenges to Lincoln's statesmanship posed by Brandon and Graber. In conclusion, I consider Lincoln's providential interpretation of the war, and I suggest that a full critique of Lincoln's statesmanship requires an engagement with this neglected aspect of his thought.

THE AFTERMATH OF *DRED SCOTT*

After the *Dred Scott* decision was handed down, the Court's opinion found vocal support from the executive and legislative branches. Two days before Taney's opinion was read from the bench, President Buchanan asserted in his inaugural address that the territorial question regarding slavery was a "judicial question, which legitimately belongs to the Supreme Court of the United States, before whom it is now pending, and will, it is

understood, be speedily and finally settled." Moreover, Buchanan proclaimed that to the Court's "decision, in common with all good citizens, I shall cheerfully submit, whatever this may be . . . ."[352] Senator Douglas likewise praised the Court's decision and insisted that the Supreme Court was the final and authoritative interpreter of the meaning of the Constitution. Yet Douglas' past insistence on the principle of popular sovereignty for territorial legislatures was difficult to square with the Court's declaration in *Dred Scott* that A) Congress had no power to limit slavery in the territories and B) Congress could not delegate to territorial legislatures power that it did not itself possess. Douglas had seemingly developed an opinion about the constitutional legitimacy of the Kansas-Nebraska Act that was independent of (and contrary to) the Supreme Court's opinion, but he went out of his way to reconcile his popular sovereignty principle with his equally firm insistence on the doctrine of judicial supremacy.[353]

Lincoln as well had to square his previous political teachings with his reaction to the Court's decision. A younger Lincoln had taught that respect for law—even bad law—was the central doctrine in American political religion. In his famous Lyceum Speech in

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[352] James Buchanan, "Inaugural Address" (March 4, 1857) in Jonathan French, ed., *The True Republican: Containing the Inaugural Addresses . . . of All the Presidents of the United States from 1789 to 1857* (Philadelphia: J.B. & Smith Company, 1857), 292.

[353] Douglas presented his mature argument on the reconcilability of the ruling in *Dred Scott* with the principle of popular sovereignty in an article printed by *Harper's* magazine in 1859. See "The Dividing Line between Federal and Local Authority: Popular Sovereignty in the Territories." *Harper's Magazine* (September 1859), pp. 519-537. Reprinted in Harry Jaffa and Robert Johannsen, eds., *In the Name of the People* (Columbus: The Ohio State University Press, 1959). Douglas' argument rests on an analytic distinction between powers that Congress can *exercise* but not *confer*, on the one hand, and powers that Congress can *confer* and not *exercise*, on the other. The enumerated powers in Article I are powers that Congress may exercise but not confer. The power to craft a policy for the domestic institutions of a territory is a power that Congress may confer but not exercise. As such, Douglas argues, regulations affection slavery—as a domestic institution—are within the authority conferred on the territorial legislatures by Congress and such regulations are not inconsistent with the *Dred Scott* decision, even though Congress may not exercise this power under the Court's ruling. Even if this distinction is granted, it still is very difficult to square Douglas' position with the Court's insistence that Congress "can confer no power on any local Government, established by its authority, to violate the provisions of the Constitution" when it is also considered that "the right to property in a slave is distinctly and expressly affirmed in the Constitution" (see *Dred Scott* at 451).

1838, Lincoln declared, "Let every American, every lover of liberty, every well wisher to his posterity, swear by the blood of the Revolution, never to violate in the least particular, the laws of the country; and never to tolerate their violation by others." But, Lincoln went on,

> . . . When I so pressingly urge a strict observance of all the laws, let me not be understood as saying there are no bad laws, nor that grievances may not arise, for the redress of which, no legal provisions have been made.--I mean to say no such thing. But I do mean to say, that, although bad laws, if they exist, should be repealed as soon as possible, still while they continue in force, for the sake of example, they should be religiously observed.[354]

While nothing in Lincoln's previous teaching is necessarily inconsistent with his opposition to the *Dred Scott* ruling, the ruling did provide the impetus for Lincoln to articulate (and perhaps develop) a nuanced understanding of the appropriate role of judicial authority in upholding the rule of law. If a strict observance of law was the central doctrine in America's political religion—and if the Taney Court was wrong in its *Dred Scott* ruling—then the Court could not play the role of the magisterium in American political life.

Upon the question of judicial authority, moreover, Lincoln had to defend himself against the charge of waging "warfare upon the Supreme Court of the United States" and uttering a proposition that "carries with it the demoralization and degradation destructive of the judicial department of the federal government."[355] Senator Douglas' criticism of Lincoln on this point was particularly strong. In a part of his speech that was reminiscent of Lincoln's warning in the "Lyceum Address," Douglas asked, "When we refuse to abide by judicial decisions what protection is there left for life and property? To whom

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[354] Lincoln, "The Perpetual of our Political Institutions: Address Before the Young Men's Lyceum of Springfield, Illinois" (January 27, 1838) in Basler, ed., *Collected Works*, 1:108-115.

[355] "Douglas at Springfield" (July 17, 1858) in *The Complete Lincoln-Douglas Debates*, 57-58.

shall you appeal? To mob law, to partisan caucuses, to town meetings, to revolution?"[356] Douglas thus thrust upon Lincoln the burden of providing a coherent theory of judicial authority that respected the rule of law while denying the concept of judicial supremacy. Additionally, Douglas charged Lincoln with attempting to usher in the very thing many of the nineteenth century opponents of the Constitution had feared would be the tendency of the federal government. Lincoln's fundamental principle, Douglas asserted, was "for consolidation, for uniformity in our local institutions, for blotting out state rights and state sovereignty, and consolidating all the power in the federal government, for converting these thirty-two sovereign states into one empire, and making uniformity throughout the length and breadth of the land."[357] From Lincoln's perspective, however, the *Dred Scott* decision portended a different kind of consolidation—a consolidation of pro-slavery principles and the nationalization of slavery throughout the Union. Viewed in this light, Lincoln attempted to refute Douglas' charge by drawing out the logic of the principles posited by the Court, principles Lincoln pledged to disregard as "rules of political action for the people and all the departments of the government."[358]

LINCOLN THE STATESMAN

A pivotal moment in Lincoln's public campaign against the *Dred Scott* decision occurred at the 1858 Illinois State Republican Convention, where Lincoln led off his address to the delegates with the following observation: "If we could first know *where* we

[356] *Ibid*., 58.
[357] *Ibid*., 55.
[358] "Lincoln at Springfield" (July 17, 1858) in *Lincoln-Douglas Debates*, 78.

are, and *whither* we are tending, we could then better judge *what* to do, and *how* to do it."[359] He had just been unanimously selected as the Republican candidate for the senatorial campaign against the Democratic incumbent, and the *Dred Scott* decision weighed heavily on his mind. The promised end to the slavery agitation had not been effected by the Kansas-Nebraska Act, and, in fact, Lincoln argued, the slavery agitation "*will* not cease, until a *crisis* shall have been reached, and passed." Quoting from the Gospel of Matthew, Lincoln famously exhorted, "a house divided against itself cannot stand." [360] The Union would cease to be divided over the slavery question by becoming entirely slave or entirely free, and the engine in the machinery tending toward the resolution of that crisis in favor of slavery had been provided by Taney's opinion in *Dred Scott*.

"The several points of the Dred Scott decision," Lincoln asserted, ". . . constitute the piece of machinery, in its *present* state of advancement."[361] According to the logic of the decision, "what Dred Scott's master might lawfully do with Dred Scott, in the free state of Illinois, every other master may lawfully do with any other *one*, or one *thousand* slaves, in Illinois, or in any other free state."[362] The logic of the decision, in other words, tended toward the resolution of the slavery question through the nationalization of slavery *via* the judiciary. Given the acquiescence of the current President and Congress in the Supreme Court's decision, and their declared commitment to the supremacy of the

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[359] "Lincoln at Springfield" (June 16, 1858), in *Lincoln-Douglas Debates*, 1.

[360] *Ibid*., 2.

[361] *Ibid*., 4. The antecedent states of this machinery, according to Lincoln, were 1) the repeal of the Missouri Compromise by the Kansas-Nebraska act; 2) the exclusion from the Kansas-Nebraska act of the amendment proposed on the floor by Samuel Chase to expressly declare that slavery could in fact be prohibited by territorial legislatures; 3) the declaration of the author of the Kansas-Nebraska act on the floor of the Senate that whether or not slavery could be prohibited by territorial legislatures was 'a question for the Supreme Court'; and 4) the endorsement by President Buchanan of the Supreme Court's forthcoming decision in *Dred Scott*. See *ibid*., pp. 2-4.

[362] *Ibid*., 5.

Court's interpretation of the Constitution, it would only take "another Supreme Court decision, declaring that the Constitution of the United States does not permit a *state* to exclude slavery from its limits" for this nationalization to be complete. Whether or not it was the result of "preconcert," the alliance between Senator Douglas, President Buchanan, and Chief Justice Taney represented the "present political dynasty" that "shall be met and overthrown."[363]

Lincoln's call for the overthrow of the 'present political dynasty' and his opposition to the *Dred Scott* decision did not constitute a call for force or violence, however. Rather, they constituted a call for the development of independent perspectives on constitutional meaning by the legislative and executive branches, and part of Lincoln's work in the Republican Party was to encourage candidates for office who would act on political principles that were formed independent of the Court's tutelage. Regarding legitimate judicial authority, Lincoln maintained that Supreme Court decisions were authoritative and final for the parties involved in the suit. Whomever the Court declared to be a slave, Lincoln assured, would not through private force or mob rule be declared free. But the principles of the Court's decision would not become binding and authoritative as "political rules" for the coordinate branches of government. "If I were in Congress," Lincoln explained, "and a vote should come up on a question whether slavery should be prohibited in a new territory, in spite of that Dred Scott decision, I would vote that it should."[364]

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[363] *Ibid*., 7.

[364] "Lincoln at Chicago" (July 10, 1858) in *Lincoln-Douglas Debates*, 36. We also know from the very first days of the Lincoln Administration that he had to decide whether or not he, as President, would obey the principles of *Dred Scott* in his actions as an executive officer. In separate instances, one free black man was denied a passport to study in France, and another free black man was denied a patent for his invention. Both of these denials were premised on the ground that black people could not be citizens of the United

It is not enough to presume that Lincoln's departmentalist view of constitutional interpretation and his opposition to *Dred Scott* were based simply on an exegesis of the constitutional text.[365] Lincoln's articulation of the constitutional wrong of the *Dred Scott* decision cannot be understood apart from his view that the Constitution was informed by moral principles, grounded in human nature, which provided the logical basis for republican government. Lincoln maintained that these principles were corroborated by the opening lines of the Declaration of Independence, and he managed to get a lot of mileage out of those "Jeffersonian axioms" during his debates with Douglas. Nevertheless, Lincoln's argument was not historicist, and it would be wrong to assume that the egalitarian principles he trumpeted were relevant only *because* they were acknowledged in the Declaration or *because* the Declaration somehow was bound up with the Constitution.

The reason Lincoln declared that a slave was not among that species of property "held rightfully" under Taney's reading of the Fifth Amendment was based on his consideration of the nature of the thing in question. The spirit that says to another man, "You work and toil and earn bread, and I'll eat it," Lincoln argued, is based upon a tyrannical principle "[n]o matter in what shape it comes, whether from the mouth of a

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States per the ruling in *Dred Scott*. Lincoln's Attorney General, Edward Bates, disputed the legitimacy of the Court's ruling by declaring that free blacks born in the United States were citizens of the United States and were thus entitled to the benefits of national citizenship. Accordingly, the Administration issued both the passport and the patent. Moving beyond these specific instances within the executive branch, the Republic Congress also passed legislation banning slavery in the territories while extending that prohibition to all territories that might be added in the future. As James Randall notes, "Congress passed and Lincoln signed a bill, which, by ruling law according to the Supreme Court interpretation was unconstitutional." See James Randall, *The Civil War and Reconstruction* (Boston: D.C. Heath & Company, 1937), pg. 136.

[365] For work on the theory of departmentalism, see, for example, Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton: Princeton University Press, 2007); Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2008); and George Thomas, *The Madisonian Constitution* (Baltimore: John Hopkins University Press, 2008).

king who seeks to bestride the people of his own nation and live by the fruit of their labor, or from one race of men as an apology for enslaving another race."[366] While Lincoln declared—in opposition to Taney's originalist pro-slavery argument—that the Founders of the American government intended to place slavery on a course toward ultimate extinction and that the Constitution itself neither distinctly nor expressly affirmed the right to hold property in men, the "real issue in this controversy," he maintained, "—the one pressing upon every mind—is the sentiment on the part of one class that does look upon [slavery] *as a wrong*, and another class that *does not* look upon it as a wrong."[367] And according to Lincoln, the wrongness of the *Dred Scott* majority opinion inhered not in its substantive interpretation of the Fifth Amendment but rather in its failure to extend the substantive protections of the Fifth Amendment to all men residing in the federal territories. But the answer to the constitutional question of whether or not the protections of the Fifth Amendment ought to be extended to any particular man depended on the answer to the antecedent question of whether that man is a man who is in full possession of those natural rights that are afforded by nature to man *qua* man. Lincoln's answer was that there is no relevant difference between the white man and the black man that would constitute the possession of different natural rights.

In order consistently to support the principles posited by Taney in *Dred Scott*, one had either to deny the humanity of black men or deny the moral relevance of human status to the constitutional rules governing property in the federal territories. For Lincoln, both of those denials were false. Equally—and perhaps more—problematic, according to Lincoln, however, was the possibility that such a sweeping denial of natural rights for one

[366] "Alton: Lincoln's Reply" (October 15, 1858) in *Lincoln-Douglas Debates*, 393.
[367] *Ibid*., 390.

class of people would destroy the logical foundation of the rights of the oppressing class. Lincoln expounded his argument in the following syllogism:

> If A. can prove, however conclusively, that he may, of right, enslave B.—why may not B. snatch the same argument, and prove equally, that he may enslave A.?— You say A. is white and B. is black. It is *color*, then; the lighter, having the right to enslave the darker? Take care. By this rule, you are to be slave to the first man you meet, with a fairer skin than your own. You do not mean color exactly?—You mean the whites are *intellectually* the superior of blacks, and, therefore have the right to enslave them? Take care again. By this rule, you are to be slave to the first man you meet, with an intellect superior to your own. But, say you, it is a question of *interest*; and, if you can make it your interest, you have the right to enslave another. Very well. And if he can make it his interest, he has the right to enslave you.[368]

The true basis of one's own freedom, Lincoln suggested, was a recognition that the *rightful* claim to freedom is not something won by convention or superior strength; and this recognition carried with it the concomitant denial that the freedom of another might *rightfully* be taken merely on the basis of convention or strength. The primary evil of the *Dred Scott* decision was its denial of this fundamental truth. Lincoln foresaw what he thought would have been the devastating effect of this principle being adopted by the legislative and executive branches, and he combated the Court's rhetoric in an attempt to prevent this principle from capturing the imagination of the public mind.

The Constitution in the Public Mind

The antifederalist writer Brutus had warned during debates on the ratification of the Constitution that judges—through the adoption of their principles as rules of action for the legislative and executive branches—would "mould the government, into almost

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[368] *Abraham Lincoln: A Documentary Portrait Through His Speeches and Writings*, ed., Don Fehrenbacher (Stanford, California: Stanford University Press, 1977), 70.

any shape they please."[369] Lincoln's opposition to *Dred Scott* had less to do with his concern for Mr. Scott himself and more to do with the way it would mold the government and shape the public mind on the issue of slavery. Douglas' "don't care" policy with respect to slavery and popular sovereignty in the territories was mistaken precisely because the policy excluded "the thought that there is anything whatever wrong in slavery."[370] Lincoln feared that Douglas' policy, coupled with the principles at work in Taney's *Dred Scott* opinion, would "gain upon the public mind sufficiently to give promise" to another judicial decision drawing out the logical implications of Taney's reasoning, which would extend and protect slavery in every state of the Union.

In his critique of the *Dred Scott* opinion, Lincoln endeavored not just to represent politically those citizens who carried antislavery sentiments, but also to educate the citizens about constitutional realities and to help form and develop those very sentiments. In his judgment of "what to do and how to do it," Lincoln surveyed the political landscape and he offered a solution within the confines of real constitutional limitations, having a "due regard for [slavery's] actual existence . . . and the difficulties of getting rid of it in any satisfactory way, and to all the constitutional obligations which have been thrown about it; but, nevertheless, desir[ing] a policy that looks to the prevention of it as a wrong, and looks hopefully to the time when as a wrong it may come to an end."[371] Lincoln's preferred constitutional policy, moreover, was predicated on his understanding that "there is no just rule other than that of moral and abstract right."[372] The reason Lincoln so emphasized the Declaration of Independence was because he saw that, to be

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[369] Brutus, "Letter XI" (31 January 1788) in Herbert Storing and Murray Dry, eds., *The Anti-Federalist: An Abridgement* (Chicago: University of Chicago Press, 1985), 167.

[370] "Galesburg: Lincoln's Reply" (October 7, 1858) in *Lincoln-Douglas Debates*, 303.

[371] *Ibid*., 304.

[372] *Ibid*., 300.

consistent, the defenders of slavery had to reject the self-evident truths spoken of in the Declaration and instead insist "that there is no right principle of action but *self-interest*."[373] Once the repudiation of the principles of the Declaration had been complete, there would be no firm basis upon which republican government could rest.

Lincoln's solution to the problem posed by a wayward judiciary was not, as it was in the tradition of the antifederalists, to declare the legislature superior to the Court. Rather, Lincoln explicitly acknowledged the power of judicial review of legislative enactments, as this "is a duty from which [judges] may not shrink." Still, Lincoln's views on judicial authority became more nuanced through his political duel with Stephen Douglas over the territorial question, and in his First Inaugural Address, with the impending sectional crisis on his mind, Lincoln went on to lay out the danger of political acquiescence in the principles of the *Dred Scott* decision:

> I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit; as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the government . . . At the same time, a candid citizen must confess that if the policy of the government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.[374]

The departmentalist view of constitutional interpretation that Lincoln articulated offered a separation of powers solution to the problem brought on by the potential for judicial pronouncements on the meaning of the Constitution to mold the government into any

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[373] "Ottawa: Lincoln's Reply" (August 21, 1858) in *Lincoln-Douglas Debates*, 116.
[374] Abraham Lincoln, "First Inaugural Address" (March 4, 1861) in Basler, ed., *Collected Works*, 4:268.

shape it pleased. Yet, Lincoln's solution was not merely procedural. It also required the work of statesmen, who would identify the tendency of constitutional politics, measure that tendency against the only just rule of action, and then propose "what to do and how to do it" within the exigencies of the contemporary political and constitutional landscape.

CONTEMPORARY CHALLENGES TO LINCOLN'S STATESMANSHIP

From a certain vantage point, however, Lincoln misapprehended entirely the project of modern constitutionalism. The challenge of "twentieth-century Hobbesians" to the old paradigm of natural law constitutionalism, Mark Brandon asserts, is "that a constitution is largely incapable of making a world that is distinguishable from the imperatives of economics, morality, culture, or politics."[375] The problem confronted by constitutionalism is therefore how to "constrain and direct political power" in light of the inability of written words to assume meaning independent of these existential realities. In dealing with this problem, modern constitutional theory has rejected, *a priori*, the notion of a "metaphysical higher law," because invocation of such a higher law is riddled with practical difficulties, including the difficulty of engendering a consensus regarding a) where such a law originates b) what makes it binding c) how its principles are to be discerned and d) how compliance is to be enforced.[376]

Hobbes, of course—like latter day Hobbesians—was critical of the classical and scholastic natural lawyers for their ineptness at providing any quantifiable methodology for arriving at the content of the laws of nature. "For the most part," Hobbes asserted,

[375] Brandon, *Free in the World*, 7.
[376] *Ibid*., 9.

"such writers as have occasion to affirm, that anything is against the law of nature, do allege no more than this, that it is against the consent of all nations, or the wisest and most civilized nations." The precepts of the laws of nature, Hobbes asserted in contrast, could be no more than "those which declare unto us the ways of peace, where the same may be obtained, and of defence where it may not."[377] In this, Hobbes's natural law theory was founded on the most universal or shared human passion, which, he maintained, was the fear of violent death. The old moral codes, however, were problematic for Hobbes's theory, because traditional notions of duty and obligation were precisely what led men to willingly endure violence and even martyrdom for a good ostensibly higher than peace. Hobbes therefore attempted to reduce this threat (i.e., the threat of violence embraced for the sake of some contested notion of a higher good) by diminishing the force and sway of the traditional moral doctrines associated with classical and scholastic natural law theories.[378]

Remnants of this Hobbesian framework are evident in Mark Graber's approach to modern constitutionalism as well. Deriving lessons from the constitutional problems posed by the institution of slavery in the nineteenth century, Graber suggests that constitutions should not be viewed as reflections or manifestations of transcendent realities but rather as "vehicles for preserving the peace among persons who have very

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[377] Thomas Hobbes, *The Elements of Law Natural and Politic*, ed., J.C.A. Gaskin (Oxford: Oxford University Press, 1994), 81. See also Thomas Hobbes, *Leviathan*, ed., Richard Tuck (Oxford: Cambridge University Press, 1996), chapters 13-15, pp. 86-100.

[378] My interpretation of Hobbes here assumes that the Hobbesian laws of nature are, as Norberto Bobbio suggests, "not laws, but mere theorems" which lead men to covenant themselves to a sovereign lawgiver. "All that Hobbes manages to squeeze out of the traditional doctrine of natural law is thus an argument in favor of the state, and of our absolute obligation to obey positive law." Norberto Bobbio, *Thomas Hobbes and the Natural Law Tradition*, trans., Daniela Gobetti (Chicago: University of Chicago Press, 1993), 145; 148. See also Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, [1950] 1963), 166-202. For a rival interpretation of Hobbes's natural law theory as a deontic divine command theory, see A.P. Martinich, *The Two God's of Leviathan* (New York: Cambridge University Press, 2003), 100-134.

different visions of the good society, a robust democracy, and the rule of law."[379] In light of the problem of moral disconsensus, in other words, the purpose of modern constitutionalism is to mediate controversies that arise between citizens with competing political aspirations. "The constitutional task," Graber asserts, "is better described as finding settlements that everyone perceives as 'not bad enough' to justify secession and civil war than as making the Constitution 'the best it can be' from some contestable normative perspective."[380]

In the American context, the failure of the original constitutional design consisted in its inefficiency at sustaining a national political community among people with deep and pervasive disagreements about the morality of slavery. Modern constitutional theory, Graber likewise maintains, vainly attempts to adjudicate constitutional disputes, and it employs some favored constitutional methodology to ascertain which party is right. Yet, past accommodations with evil provide resources for reasonable legal arguments to be made in favor of past injustices where there are remaining constitutional ambiguities. Constitutions, therefore, can only "successfully settle political conflicts in the long run by creating a constitutional politics that consistently resolves contested questions of constitutional law in ways that most crucial political actors find acceptable."[381]

Problems of constitutional evil are thus not simply about whether persons should respect explicit constitutional provisions that accommodate practices they believe to be unjust. Rather, Graber argues,

> Political orders in divided societies survive only when opposing factions compromise when constitutions are created and when they are interpreted. The price of constitutional cooperation and union is a willingness to abide

[379] Graber, *Dred Scott and the Problem of Constitutional Evil*, 253.
[380] *Ibid*., 2.
[381] *Ibid*., 3.

> by clear constitutional rules protecting evil that were laid down in the past and a willingness to make additional concessions to evil when resolving constitutional ambiguities and silences in the present.[382]

Dred Scott emerges, in this context, as a centrist decision; a decision, in other words, that was at least as legitimate an interpretation of American constitutionalism as any other. After the American bisectional consensus broke down, moreover, the only remaining political branch that was controlled by a Southern majority was the Supreme Court, and "In *Dred Scott*," Graber suggests, "the Supreme Court fostered sectional moderation by replacing the original Constitution's failing political protections for slavery with legally enforceable protections acceptable to Jacksonians in the free and slave states."[383] Under these conditions, he maintains, slavery could only be eradicated by civil war—"not by judicial decree or the election of an anti-slavery coalition."[384] Graber's challenge, then, is this: Modern partisans of the antislavery cause ought to consider, with all of the benefits of hindsight, "whether antislavery Northerners should have provided more accommodations for slavery than were constitutionally strictly necessary or risked the enormous destruction of life and property that preceded Lincoln's 'new birth of freedom.'"[385]

In Brandon's similarly iconoclastic treatment of constitutionalism and American slavery, he has suggested an alternative theory of constitutionalism that emphasizes the procedural and historically contingent character of the constitutional enterprise. On Brandon's account, the "new" constitutionalism ushered in by the 1787 Constitution jettisoned nature as a source of constitutionally relevant norms. Rather than being an

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[382] *Ibid*., 3.
[383] *Ibid*., 13.
[384] *Ibid*., 4.
[385] *Ibid*., 4.

attempt to secure rights that have a trans-historical basis, the new constitutionalism is defined as a certain type of activity—"an experiment in a particular mode of establishing, directing, and limiting political power"—that is itself historically contingent.[386] Accordingly, constitutional failure with respect to slavery is not understood in terms of a denial of natural human rights but rather as a failure to abide by the historically contingent standards of modern constitutionalism. Those standards require that individuals be able to "construct their political identities" with reference to the regime's fundamental law. "Notice that this claim," Brandon points out,

> does not rest on the notion that the Constitution violated the principle of 'human dignity.' It may well have done so, but within the assumptions of the new constitutionalism, invoking a standard of human dignity is problematic, not least because of its metaphysical roots. Human dignity evokes natural law and natural rights, which are off limits in the new constitutionalism."[387]

Yet on a different account—commonly associated with Lincoln, but having deep roots in the American political tradition—the failure of the antebellum constitutional order was understood precisely in terms of natural law and natural rights. It is not surprising, then, that antislavery constitutionalists in the nineteenth century such as John Quincy Adams quite consciously rejected the general premises of Hobbes's political science. Hobbes's doctrine, Adams asserted, was "utterly incompatible with any theory of human rights, and especially with the rights which the Declaration of Independence proclaims as self-evident truths."[388] In the founding generation, as well, Alexander

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[386] Brandon, "Constitutionalism and Constitutional Failure," in Barber and George, eds., *Constitutional Politics*, 304.

[387] *Ibid*., 306.

[388] John Quincy Adams, *Argument of John Quincy Adams, Before the Supreme Court of the United States, in the Case of the United States, Appellants, vs. Cinque, and others, Africans, Captured in the Schooner Amistad . . .* (New York: S.W. Benedict, 1841), 89. See also John Quincy Adams, *The Social Compact Exemplified in the Constitution of the Commonwealth of Massachusetts . . .* (Providence: Knowles

Hamilton offered his own conventionalist interpretation of Hobbes's theory: "Moral obligation according to him, is derived from the introduction of civil society; and there is no virtue, but what is purely artificial, the mere contrivance of politicians, for the maintenance of social intercourse."[389] The ultimate reason for Hobbes's rejection of the classical natural law paradigm, Hamilton conjectured, moreover, was because Hobbes "disbelieved the existence of an intelligent superintending principle, who is the governor, and will be the final judge of the universe."[390]

The ultimate grounding principle for the laws of nature was for Hamilton, as it was in the Declaration, a providential God who was at once a lawgiver and a judge for mankind. The challenge of neo-Hobbesians, I take it, is directed precisely at this foundational understanding, based, in part, on a perceived tendency for such a doctrine to engender political violence. Insomuch as Lincoln constantly appealed back to first principles to provide an ultimate foundation for the American regime, and an ultimate justification for prosecuting the Civil War, Lincoln's statesmanship has also been the subject of revised interpretations in light of "new" conventionalist or antifoundationalist constitutional theories that privilege peace over contested notions of the good.[391] In this vein, Brandon questions whether the cost in blood of the Civil War could possibly justify the end of preserving Union (even if Lincoln was correct in maintaining that secession was itself unconstitutional), and Graber, within his discussion of constitutional evil,

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and Vose, 1842), 24. Hobbes's theory, Adams asserted, "severs the Gordian knot with the sword, extinguishes all the rights of man, and makes force the corner stone of all human government. It is the only theory upon which slavery can be justified as conformable to the law of nature."

[389] Alexander Hamilton, "The Federal Farmer Refuted," in *The Works of Alexander Hamilton,* ed. Henry Cabot Lodge, 12 vols. (New York: G.P. Putnam's Sons, 1904), 1:61-62. For an insightful essay on Hamilton's views of slavery, see Michael D. Chan, "Alexander Hamilton on Slavery," *Review of Politics* (2004) 66:207-231.

[390] Hamilton, *The Works of Alexander Hamilton*, 1:62.

[391] For a fuller sketch of Brandon means by "new" and "old" constitutionalism, see Brandon, *Free in the World*, 3-33.

asserts forcefully: "*Dred Scott* was wrong and Lincoln right only if John Brown was correct when he insisted that slavery was sufficiently evil to warrant political actions that 'purge[d] this land in blood.'"[392] The historical causality of the Civil War is, of course, convoluted and deeply contested, and it would be anachronistic to assume that Lincoln, or any other participant, could have anticipated the level of devastation the war would bring. Yet, as the war progressed Lincoln did wrestle with these questions, and, as he did, he emphasized the practical limits of prudential statesmanship while his rhetoric became increasingly deferential to the mysterious workings of divine providence.

THE LIMITS OF CONSTITUTIONAL STATESMANSHIP

The Civil War historian and Lincoln scholar Allen Guelzo notes that "Prudence was, for Lincoln, a means for balancing respect for a divine purpose in human affairs with the candid recognition that it was surpassingly difficult to know what purposes God might have."[393] Of course, Lincoln's religious views are still highly contested. In his own day, he was accused both of impiety and religious fanaticism and debate over the true character of Lincoln's religious faith has continued unabated in contemporary scholarship. Lucas Morel notes that Lincoln is often conceived of as "either 'the mere politician' or 'the pious man' of Washington's Farewell Address" while furthering his own view that "Lincoln transcends the mere politician and the pious man in a statecraft

[392] Graber, *Dred Scott and the Problem of Constitutional Evil*, 8.
[393] Allen Guelzo, "The Prudence of Abraham Lincoln," *First Things*, January 2006, pg. 13.

that is both politic and pious."[394] This, too, was the view of Reinhold Niebuhr in his classic essay in *The Christian Century*. "Analysis of Abraham Lincoln's religion," Niebuhr wrote,

> . . . in the context of the prevailing religion of his time and place and in the light of the polemical use of the slavery issue, which corrupted religious life in the days before and during the Civil War, must lead to the conclusion that Lincoln's religious convictions were superior in depth and purity to those held by the religious as well as by the political leaders of his day.[395]

Niebuhr also maintained that "Lincoln's religious faith was informed primarily by a sense of providence . . . [and that] the chief evidence of the purity and profundity of Lincoln's sense of providence is the fact that he was able to resist the natural temptation to . . . identify providence with the cause to which he was committed."[396]

In analyzing the Civil War president's statesmanship, moreover, one must carefully consider Lincoln's public statements about providence if one is to take seriously his own answer to the charge that he engaged in a reckless and imprudent statesmanship that invited war in the name of justice while risking the possibility that such a war would achieve "neither peace nor justice."[397] Even if Lincoln was correct as a matter of constitutional principle both in his opposition to the *Dred Scott* decision in 1857 and in

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[394] Lucas Morel, *Lincoln's Sacred Effort: Defining Religion's Role in American Self-Government* (Lanham, MD: Lexington Books, 2000), 9. For utilitarian accounts of Lincoln's religious rhetoric, see, for example, Harry V. Jaffa, *Crisis of the House Divided: An Interpretation of the Issues in the Lincoln-Douglas Debates*, 2nd edition (Chicago: University of Chicago Press, 1982); Harry V. Jaffa, *A New Birth of Freedom* (Lanham, MD: Rowman & Littlefield, 2000); Michael Zuckert, "Lincoln and the Problem of Civil Religion" in John A. Murley, et al., eds., *Law and Philosophy: The Practice of Theory: Essays in Honor of George Anastaplo*, vol. 2 (Athens: Ohio University Press, 1992), 720-743. For a more pious accounts (that also recognize the utility of religion), see, for example, Allen Guelzo, *Abraham Lincoln: Redeemer President* (Grand Rapids, MI: William B. Eerdmans, 1999); Joseph R. Fornieri, *Abraham Lincoln's Political Faith* (DeKalb: Northern Illinois University Press, 2003); Mark Noll, *The Civil War as a Theological Crisis* (Chapel Hill: The University of North Carolina Press, 2006)

[395] Reinhold Niebuhr, "The Religion of Abraham Lincoln," *The Christian Century* (10 February 1965), 172.

[396] Niebuhr, "The Religion of Abraham Lincoln," 172-173.

[397] Graber, *Dred Scott and the Problem of Constitutional Evil*, 243.

his opposition to secession in 1861, one might still have counseled (if, indeed, one could have had access to knowledge of the war's intensity and duration) that, as a prudential matter, the North nevertheless ought to allow the Union to dissolve peacefully. In retrospect, such a judgment is particularly compelling. Senator Henry Wilson, a firm abolitionist and unionist, reflecting on the massive destruction of life and property during the war, concluded that "If that scene could have been presented to me before the war, anxious as I was for the preservation of the Union, I should have said: 'The cost is too great; erring sisters, go in peace.'"[398]

In our constantly revised interpretations of Lincoln's statesmanship, the immense cost of the war requires us to consider what, if anything, Lincoln's providentialism added to his own war time decisions. Was Lincoln's providential rhetoric a mere utilitarian use of religious language for political purposes, the sincere (but misguided) sentiments of an anguished nineteenth century politician, or the reflections of a political participant that really did, as Niebuhr suggests, reflect something pure and profound? Constitutional theorists often implicitly deny the third possibility by exclusively emphasizing the political utility of Lincoln's religious rhetoric or by emphasizing the contingent character of the war's outcome on fortuitous circumstances and events while neglecting to consider Lincoln's providential interpretation of the conflict as a viable interpretation. But Lincoln reflected deeply about the price of the war, about the meaning and foundation of American constitutionalism, and about the alternative course of action that would have consisted in compromising more than was constitutionally necessary in order to maintain constitutional peace. In each of these areas, Lincoln's thought is made intelligible only by

[398] Quoted in Allan Nevins, *The War for the Union*: *The Organized War to Victory, 1864-1865*, Vol. 4 (New York: Scribner, 1971), 23.

considering the possibility that politics is limited and circumscribed in some sense by a superintending providence.

This is not to imply that Lincoln exhibited a high degree of confidence in his own knowledge of the divine will. Quite the opposite, he always professed his ignorance. "I hope it will not be irreverent for me to say," he told a group of abolitionist ministers, "that if it is probable that God would reveal his will to others, on a point so connected with my duty, it might be supposed he would reveal it directly to me . . . These are not, however, the days of miracles, and I suppose it will be granted that I am not to expect a direct revelation."[399] In the absence of clear knowledge of the divine will, prudence in the classical sense, rather than divination or augury, was for Lincoln the virtue by which the statesman was to be guided in public policy deliberation. After offering his potentially irreverent remarks about the divine will to the group of ministers, Lincoln concluded: "I must study the plain physical facts of the case, ascertain what is possible and learn what appears to be wise and right. The subject is difficult, and good men do not agree."[400] Yet Lincoln also maintained that the prudence of a statesman was bounded and limited by the mysterious workings of an inscrutable divine will.

Because men did not agree in Lincoln's day, as they do not in our own, any association of one's own preferred policy with the good and right could have been met with a disparate contention and the association with the good and right of a diametrically opposed policy. Such a problem was certainly amplified by the millennialist tendency of each side to associate their own preferred policy with the will of God. In the face of such disagreement, then, the problem of constitutional evil emerged in an especially cogent

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[399] Lincoln, "Reply to Emancipation Memorial" in Basler, *Collected Works*, 5:419-20.
[400] *Ibid*., 5:419-20.

way on the eve of civil war. Quoting Sanford Levinson's *Constitutional Faith*, Graber describes the universal condition of large, diverse polities as one in which "'one person's notion of justice is often perceived as manifest injustice by someone else.'"[401] Lincoln recognized this when he wrote to Alexander Stephens, "You think slavery is right and should be extended; while we think slavery is wrong and ought to be restricted. That I suppose is the rub."[402]

While Lincoln desired peace, however, he was willing to accept war rather than compromise this principle, disavowing "those sophisticated contrivances such as groping for some middle ground between the right and the wrong."[403] His willingness to accept war also reflected his recognition that there were limits to what might be achieved through statesmanship, and in recognizing these limits, Lincoln sought to absolve himself of responsibility for the conflict. "In your hands," Lincoln told his southern brethren, ". . . and not in mine, is the momentous issue of civil war."[404] As the war progressed, moreover, Lincoln increasingly framed the contest in terms of providential history. Finally, in his Second Inaugural Address, Lincoln reflected:

> The Almighty has His own purposes. 'Woe unto the world because of offences! for it must needs be that offences come; but woe to that man by whom the offence cometh!' If we shall suppose that American Slavery is one of those offences which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove, and that He gives to both North and South, this terrible war, as the woe due to those by whom the offence came, shall we discern therein any departure from those divine attributes which the believers in a Living God always ascribe to Him? Fondly do we hope—fervently do we pray—that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue, until all the wealth piled by the bond-man's two hundred and fifty years of unrequited toil

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[401] Sanford Levinson, *Constitutional Faith* (Princeton University Press, 1989), 72. Quoted in Graber, *Dred Scott and the Problem of Constitutional Evil*, 8.

[402] Lincoln, "Letter to Alexander H. Stephens" (December 22, 1860) in Basler, *Collected Works*, 4:160.

[403] Basler, *Collected Works* 4:29

[404] Lincoln, "First Inaugural Address" (March 4, 1861) in Basler, *Collected Works*, 4:268.

> shall be sunk, and until every drop of blood drawn with the lash, shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said 'the judgments of the Lord, are true and righteous altogether.'[405]

This also is consistent with the "Meditation on Divine Will" found in Lincoln's private journal. "The will of God prevails," Lincoln wrote.

> In great contests each party claims to act in accordance with the will of God. Both *may* be, and one *must* be wrong . . . In the present civil war it is quite possible that God's purpose is something different from the purpose of either party—and yet the human instrumentalities, working just as they do, are of the best adaptation to affect His purpose. I am almost ready to say this is probably true—that God wills this contest, and wills that it shall not end yet. By his mere quiet power, on the minds of the now contestants, He could have either saved or destroyed the Union without a human contest. Yet the contest began. And having begun He could give the final victory to either side any day. Yet the contest proceeds.[406]

In his reflections on providence, Lincoln qualified his remarks with a certain humility[407] that evidenced the internal dynamic between faith and doubt at work in "an anguished participant searching for ultimate meaning."[408] Lincoln thought about the tragic conflict within the context of a providentially ordered universe that made intelligible such concepts as collective guilt and collective punishment as well as a divine justice which, however indiscernible in its particularities, did ultimately guide human events. The sins of the fathers truly were visited upon the third and fourth generations.

After the *Dred Scott* decision in 1857 and continuing throughout the Civil War, Lincoln interpreted his own public actions as actions that were motivated by principle and guided by prudence while nevertheless being limited by the mysterious purposes of divine providence. Evaluating Lincoln's statesmanship within this context requires that

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[405] Lincoln, "Second Inaugural Address" (March 4, 1865) in Basler, *Collected Works*, 8:333.
[406] Lincoln, "Meditation on Divine Will" (September 2, 1862) in Basler, *Collected Works*, 5:403-4.
[407] E.g., "If we shall suppose"; "I am almost ready to say" in the passages quoted above.
[408] Fornieri, *Abraham Lincoln's Political Faith*, 40.

we attend to Lincoln's interpretation of the later conflict. In his discussion of constitutional justice and constitutional peace, Graber identifies today's John Bell voters—voters, that is, who are always willing to compromise with evil in order to procure peace—as those who maintain that "peace . . . is intrinsically more just than war."[409] Yet in his discussion of today's Lincoln voters, Graber is conspicuously silent about the notion that war could ever be an instrument of providential justice. In his account of constitutional failure, Brandon relatedly discounts the idea that the antebellum constitutional order rested "on *a priori* assumptions about the character, worth, or rights of human beings."[410] Lincoln, however, did conceive of constitutional failure and the impetus of the Civil War precisely in these metaphysical and theological terms.

Perhaps it is an implicit premise in modern scholarship that Lincoln could not have meant what he said in this respect or that what he said has been deemed irrelevant by the progression of the social sciences. That premise, however, needs to be made explicit and argued for before the old constitutionalism, which was conceived of in terms of a providential order and judged by its compatibility with "the dignity of human nature," is jettisoned in our modern analysis of the lingering problems of constitutional evil and constitutional failure. For we must first grapple with those nineteenth century arguments concerning natural rights, man's place in the divinely constituted cosmos, and the tragic and uncertain price of maintaining free government amid the contingencies of political life before we are adequately able to judge or even to consider the contention of one former slave—after reflecting on the massive cost of the war, including Lincoln's own violent death at the hand of an assassin—that "it was perhaps better for the country

[409] Graber, *Dred Scott and the Problem of Constitutional Evil*, 253.
[410] Brandon, "Constitutional Failure," in *Constitutional Politics*, 306.

and for mankind that the good man could not know the end from the beginning."[411] For such could only have been the sentiments of a man who did not think peace was intrinsically more just than war.

Our inability, or unwillingness, to consider such arguments, however, has been fortified by a particularly modern solution to the enduring problems posed by political and moral disagreement. Reasons which seek to provide ultimate justification for political solutions, it has been suggested, ought to be abandoned in constitutional deliberation in favor of public reasons that can be mutually affirmed by citizens independent of their disparate philosophical and theological premises. In its most prominent form, the theory of public reason developed by John Rawls draws its sustenance from the public political culture of modern democratic societies. But the arguments of antislavery constitutionalists in the nineteenth-century were notable precisely because they challenged, from foundational premises, important aspects of their own public political culture. Within the context of Rawls's theory of public reason, therefore, I turn in the next chapter to a consideration of the types of arguments put forward by antislavery constitutionalists extending, as it were, from some of the early antecedents discussed in previous chapters to the former slave and prolific public orator Frederick Douglass.

[411] Frederick Douglass, *Life and Times of Frederick Douglass* (Hartford, CT: Park Publising Company, 1881), 409.

Chapter 6: Freedom in an Age of Slavery

The runaway slave turned abolitionist Frederick Douglass told a Boston crowd in 1855 that he found it "exceedingly difficult to suppose the existence of an honest difference of opinion with regard to the wrongfulness of slavery . . . And yet," Douglass contended,

> it is proper for an anti-slavery man to assume that those who defend slavery are honest in their views of things. But it is difficult to see how any one can suppose that such an open, flagrant, enormous violation of right as is involved in the relation of master and slave, can exist without sin and wrong.[412]

In a society that was deeply fractured by serious and fundamental moral questions—questions implicating the foundational principles around which public life was to be ordered—what types of arguments, then, might have been offered to reasonable citizens with whom one disagreed? What types of resources, that is, could legitimately have been brought to bear on a divisive question in a divided society? If we were to look to the public arguments made by Douglass and his fellow abolitionists for a potential answer, we would find something greatly divergent from the peculiarly modern notion of "public reason," which seeks to ground public deliberation in a "consensus" found in the overlapping views of reasonable citizens.

John Rawls has offered what perhaps is the most wide-ranging and influential theory of public reason, and his theory has engendered a voluminous secondary literature touching on the types of arguments that are appropriate to public discourse in a liberal

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[412] Frederick Douglass, "An Inside View of Slavery: An Address Delivered in Boston, Massachusetts" (8 February 1855) in John W. Blassingame, ed., *The Frederick Douglass Papers* (New Haven: Yale University Press, 1985), 3:6.

democratic society. When deliberating on matters of constitutional essentials and basic justice, Rawls argues, the idea of public reason requires public actors to articulate reasons that can be mutually affirmed by citizens independent of any particular comprehensive religious, moral, or philosophical doctrine. One particular controversy over the theory of public reason has emerged because of the public use of theological and philosophical arguments by both nineteenth-century abolitionists and twentieth-century civil rights leaders. Many influential abolitionists—from William Wilberforce to William Garrison—largely based their case against slavery on theological grounds, and civil rights leaders such as Martin Luther King, Jr. drew heavily from the Christian, natural law, and German idealist traditions while making their case against racial segregation. Because contemporary liberals are partisans of the abolitionist and civil rights movements, a debate has emerged among scholars about whether the rhetoric of these movements is in fact compatible with public reason, and, if not, whether this inflicts a fatal blow on the liberal credentials of Rawls's theory.[413] As David Richards writes of Rawls's critics, "The thought must be: if these forms of rights-based dissent were deemed illegitimate by a distinctively liberal political theory, such a theory would be fundamentally inadequate to its task."[414] One such challenge has come from Rawls's colleague Michael Sandel, who argues that Rawls is unable to give an account, consistent with the "idea of public reason," of why he would have sided with Abraham Lincoln over Stephen Douglas in the

[413] See, for example, David A.J. Richards, "Public Reason and Abolitionist Dissent," 69 *Chicago-Kent Law Review* 787, 1994; Stephen Macedo, "In Defense of Liberal Public Reason: Are Slavery and Abortion Hard Cases?" 42 *American Journal of Jurisprudence* 1, 1997, 1-29; Christopher Wolfe, *Natural Law Liberalism* (New York: Cambridge University Press, 2006), pp. 9-43; David Lewis Schaeffer, *Illiberal Justice: John Rawls vs. the American Political Tradition* (Columbia, MO: University of Missouri Press, 2007), pp. 287-289.

[414] David A.J. Richards, "Public Reason and Abolitionist Dissent," 787.

Illinois senatorial campaign of 1858—a devastating criticism for any modern partisan of Lincoln's new birth of freedom.[415]

Sandel's challenge to Rawls occurs in conjunction with an analysis of the contemporary public debate regarding abortion law, and much of the related literature has treated the slavery question as tangential to contemporary controversies over issues such as abortion, sex and gender discrimination, and gay rights. Other scholars have offered a more penetrating analysis of abolitionism and public reason, but none, so far as I can tell, has distinguished abolitionism as a distinct political movement from the wider antislavery constitutional tradition of which Lincoln was a part. When considering public debate in the nineteenth century, however, there are good reasons to distinguish between the abolitionists who concluded that the Constitution represented a pro-slavery compact and advocated a withdrawal from all political participation and the more moderate antislavery jurists and statesmen who consistently argued that the logic of American constitutionalism rested on a theological and philosophical foundation that was antithetical to chattel slavery.

Indeed, public deliberation on the constitutionality of slavery in antebellum America provides a particularly cogent example of debate that centers on "constitutional essentials and questions of basic justice,"[416] to which the strictures of Rawlsian public reason ostensibly apply. In this chapter, I examine the idea of public reason, and I argue that Rawls's theory fails to offer an adequate normative basis from which to critique the laws concerning slavery in nineteenth-century America. In the first section, I return

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[415] Michael J. Sandel, "Political Liberalism," *Harvard Law Review*, Vol. 107, No. 7 (May, 1994). See also Michael J. Sandel, *Liberalism and the Limits of Justice* (New York: Cambridge University Press, 1982).

[416] John Rawls, *Justice as Fairness: A Restatement* (Cambridge: Harvard University Press, 2001), 89.

briefly to the Lincoln-Douglas debates (discussed in chapter 3), which center on fundamental constitutional questions in light of the Supreme Court's pro-slavery ruling in *Dred Scott v. Sandford* (1857). I then explore the idea of public reason within the context of abolitionism and antislavery constitutionalism generally before proceeding to a description of the ways in which antislavery constitutionalists publicly described the moral and constitutional wrongs of the *Dred Scott* decision. Finally, I conclude that Rawls's theory of public reason is at odds with the classical liberalism of the antislavery constitutional tradition.

LINCOLN, DOUGLAS, AND AMERICAN DEMOCRACY

The celebrated debates between Abraham Lincoln and Stephen Douglas centered on the contested issue of slavery and territorial expansion in the wake of both the Supreme Court's *Dred Scott* decision, which found a constitutional right to territorial slaveholding implicit in the due process clause of the 5th amendment, and Douglas's Kansas-Nebraska Act (1854), which replaced the bisectional arrangement of the Missouri Compromise with a policy of popular sovereignty with respect to slavery in the federal territories. Douglas, an avowed democrat and a defender of the *Dred Scott* decision, held that the cornerstone of the American regime was "the great principle of self-government, which asserts the right of every people to decide for themselves the nature and character of the domestic institutions and fundamental law under which they are to live."[417] For Douglas, the moral propriety of slavery was an inappropriate subject for national

[417] Stephen Douglas, "Speech at Galesburg" (October 7, 1858) in *The Complete Lincoln-Douglas Debates of 1858*, ed., Paul M. Angle, 2nd Edition (Chicago: University of Chicago Press, 1991), 288.

deliberation, and slave policy was a question legitimately determined by the local *demos*. The editor of one compilation of the debates summarizes Douglas's position: "Moral judgment of the slaveholders was not a subject for political debate but was a matter for their consciences and their God."[418]

Lincoln, it will be recalled, attempted to exploit the inconsistency in Douglas's argument that slavery should be left to democratic majorities regardless of the moral status of slavery. "When Judge Douglas says that whoever, or whatever community, wants slaves, they have a right to have them," Lincoln asserted, "he is perfectly logical if there is nothing wrong in the institution; but if you admit that it is wrong, he cannot logically say that anybody has a right to do a wrong."[419] It was a "false philosophy" and "false statesmanship," Lincoln declared in his final debate with Douglas, to endeavor "to build of a system of policy on the basis of caring nothing about *the very thing that everybody does care the most about*."[420] While conceding that self-governance was indeed one of the great principles of the American regime, Lincoln held that the principles of the Declaration anteceded and undergirded the Constitution and were, as he later wrote, "the principles and axioms of a free society."[421] In other words, the judgment of whether or not slave policy ought to be left to democratic majorities, according to Lincoln, rested on a prior judgment of whether the slave "is *not* or *is* a man."[422] The

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[418] David Zarefsky, foreword to *Lincoln-Douglas Debates*, xvi.

[419] Lincoln, "Speech at Quincy" (October 13, 1858) in *Lincoln-Douglas Debates*, 334.

[420] Lincoln, "Speech at Alton" (October 15, 1858) in Basler, *Collected Works of Abraham Lincoln*, 3: 311.

[421] Abraham Lincoln, "The Principles of Jefferson: Letter to Henry L. Pierce and Others" (April 6, 1859) in *Abraham Lincoln: A Documentary Portrait Through His Speeches and Writings*, ed., Don E. Fehrenbacher (Stanford: Stanford University Press, 1964), 120.

[422] Roy P. Basler, ed., *The Collected Works of Abraham Lincoln* (New Brunswick, NJ: Rutgers University Press, 1953), 2:265-66. Even after the judgment that the slave was a man, there were still prudential political considerations that might offer reasons to compromise with the slave interest, and the "slave clauses" in the Constitution and the Missouri Compromise (1820) represent such occasions for

relevance of this question, in turn, rested on a still prior judgment about the validity of those "Jeffersonian axioms"; namely, that "all men are created equal and are endowed by their Creator with certain inalienable rights." Douglas, on the other hand, affirmed that the universal language in the Declaration of Independence was "intended to allude only to the people of the United States, to men of European birth or decent, being white men, that they were created equal, and hence that Great Britain had no right to deprive them of their political and religious privileges . . ."[423] The liberties secured by the Constitution applied only to white men, according to Douglas, and the question of whether or not "inferior races" were to be enslaved was a question to be decided legitimately by the ballot.

Taking his cue from these debates between Lincoln and Douglas, Sandel argues that the contested political question at the heart of the controversy over slavery in the nineteenth century was a question that could not have been settled by appealing to notions of citizenship implicit in American political culture, which is the starting point for Rawls' theory of public reason. Rawls had the advantage of writing in the late twentieth century, and he began with a public political culture that regarded it as a fact, as he continually affirmed, that we are all free and equal. But that fact certainly was not the subject of anything like a consensus in 1858, and, as Sandel argues, "To the extent that political liberalism refuses to invoke comprehensive moral ideals and relies instead on notions of citizenship implicit in the political culture, it would have a hard time

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Lincoln. But Lincoln casts each of those compromises as policies crafted with a view toward a day when slavery would become extinct and not as acquiescence in the institution of slavery as a permanent feature of our political system.

[423] Douglas, "Speech at Springfield" (July 17, 1858) in *Lincoln-Douglas Debates*, 62-63.

explaining, in 1858, why Lincoln was right and Douglas was wrong."[424] Additionally, there is a question of whether the idea of public reason in Rawls' political theory can account for the legitimacy of the arguments put forward not only by Lincoln but by antislavery activists, public officials, and jurists generally during the nineteenth century.[425]

THE IDEA OF PUBLIC REASON

The idea of public reason, according to Rawls, is "part of the idea of democracy itself."[426] That is to say, democracy engenders a culture of free institutions, and the "normal" result of such institutions is the existence of a "plurality of conflicting reasonable comprehensive doctrines, religious, philosophical, and moral."[427] Beginning with the "fact of reasonable pluralism," then, Rawls proposes that we "consider what kinds of reasons [democratic citizens] may reasonably give one another when fundamental political questions are at stake."[428] The answer is that citizens, as free and equal members of the political community, must give reasons that are part of an "overlapping consensus" between reasonable comprehensive doctrines. Because citizens in a democratic regime hold reasonable but mutually exclusive comprehensive doctrines,

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[424] Sandel, "Political Liberalism," 1782.

[425] Rawls maintains that there is no inconsistency between the idea of public reason and the arguments put forward by American abolitionists and antislavery public officials. See John Rawls, *Political Liberalism*, Expanded Edition (New York: Columbia University Press, 2005), 250-251. See also John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001), 90, n. 12, and John Rawls, "The Idea of Public Reason Revisited," reprinted in *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), 154, n. 54, and 174.

[426] John Rawls, "The Idea of Public Reason Revisited," in *The Law of Peoples*, 131.

[427] *Ibid*., 131.

[428] *Ibid*., 132.

the idea of public reason bars arguments that are not part of this overlapping consensus (i.e., it excludes reasons based on particular comprehensive doctrines) from the "public political forum," where judges, public officials, and political candidates seek to persuade free and equal citizens to act on political values that all reasonable people may be expected to endorse.[429]

In his criticism of Rawls, Sandel suggests that the theory of public reason would have barred public arguments against slavery that were based on metaphysical or theological doctrines. This is potentially problematic for the antislavery tradition, because public arguments against slavery in antebellum America largely were based on appeals away from the political culture to some conception of natural or divine order, which was thought to bolster or inform constitutional government. When debating the congressional gag-rule against antislavery petitions, for example, Horace Mann combined appeals to natural and divine law in a synthesis that was common to such antislavery protests before declaring that one of the collateral affects of barring petitions against slavery in the House of Representatives was "the promulgation from the halls of Congress, and also from—what in such cases, is not the sacred, but the profane desk—that there is no 'higher law' than the constitution, or any interpretation which any corrupt Congress may put upon it."[430]

While antislavery arguments were often based on appeals to natural or divine law, similar arguments were made in defense of slavery as well. In a speech before the United States Senate, Judah Benjamin described the right to hold property in slaves as emanating from "the principles of eternal justice which God has implanted in the heart of man," and

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[429] See *ibid*., 133.

[430] Horace Mann, "The Institution of Slavery" (August 17, 1852) in *Congressional Globe*, 32nd Congress, 1st Session, pp. 1071-1080.

Southern intellectuals offered sophisticated metaphysical and theological defenses of their peculiar institution.[431] The point is not that reasoning from foundational concepts settles the debate over slavery; rather, it is that from the perspective of many nineteenth century Americans "discussion on the great question of human freedom . . . involve[d] the whole question of free agency and human accountability and the entire plan and order of Divine government."[432]

Arguments against slavery in the twenty-first century perhaps could be made solely with reference to concepts implicit in our political culture (including, significantly, the 13th Amendment), but such appeals are not decisive in our analysis of events in the nineteenth century. The problem Sandel identifies in Rawls's theory is that (as a *political* conception) it is not grounded in anything beyond the public political culture and thus cannot assume the critical stance that was assumed by the antislavery tradition. Additionally, as David Lewis Schaeffer notes, there is a "central paradox running throughout Rawls's project, in that he seeks to resolve a supposed impasse in the public political culture by articulating an account of justice derived from ideas that are already implicit in that culture."[433] In other words, Rawls is left without a permanent standard of right against which the contradictory aspects of the political culture may be judged.

The problem of Rawls's antifoundationalism is particularly evident in his account of the freedom and equality of democratic citizens, which finds an amusing analogy in an anecdote from Stephen Hawking's *A Brief History of Time*:

> A well-known scientist once gave a public lecture on astronomy. He described how the earth orbits around the sun and how the sun, in turn,

[431] Judah Phillip Benjamin, "On the Property Doctrine" (March 11, 1858) in *American Orations* (New York: The Knickerbocker Press, 1896), 3:129-153.
[432] Horace Mann, "The Institution of Slavery."
[433] David Lewis Schaeffer, *Illiberal Justice*, 252.

> orbits around the center of a vast collection of stars called our galaxy. At the end of the lecture, a little old lady at the back of the room got up and said: 'What you have told us is rubbish. The world is really a flat plate supported on the back of a giant tortoise.' The scientist gave a superior smile before replying, 'What is the tortoise standing on?' 'You're very clever, young man, very clever,' said the old lady. 'But it's turtles all the way down!'[434]

To the question of what provides the foundation for the freedom and equality of citizens in a democratic society, Rawls offers a similarly unsatisfying answer: Our public status as free and equal citizens inheres in the fact that within our public political culture we *regard* all citizens as free and equal. For the purposes of political liberalism, Rawls disavows any reliance on a metaphysical conception of man, and he therefore cannot engage the question of whether (and in what sense) all men are, in fact, free and equal.[435] As John Finnis observes, "The question whether the opinions that overlap in this consensus are correct or true, and whether those reasons are valid or sound, is to be set aside by public reason, i.e., in decision-making on the fundamental questions of political life and legislation."[436] The foundations of political liberalism are thus laid in the shifting

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[434] Stephen Hawking, *A Brief History of Time*, 2nd Edition (New York: Bantam Books, 1996), 1.

[435] Additionally, Rawls' theory applies only to *citizens*, and, for the purposes of political liberalism, citizens are defined as those human beings who are engaged in mutually beneficial social cooperation over time. Such social cooperation requires that citizens have a) a capacity for a sense of justice and b) a capacity for a conception of the good. In addition, these two "moral powers" define "moral persons" and "moral personality." In other words, all citizens are moral persons who are regarded as free and equal, but not all human beings are citizens. Moreover, the idea of free and equal persons is "worked up" from "the public political culture of a democratic society, in its basic political texts (constitutions and declarations of human rights), and in the historical tradition of the interpretation of those texts." There is a question, then, of where slaves in the public political culture of nineteenth century America might fit into this scheme and why, on Rawls' account, they could be regarded as moral persons absent some metaphysical view of the moral status of human beings as such. Rawls, of course, could appeal to his own Kantian liberalism, but this would undercut his claim that the idea of citizens as free and equal persons belongs to a "political conception" rather than to a "conception of the person [. . .] taken from metaphysics or the philosophy of mind, or from psychology." As Rawls admits, ". . . it may have little relation to conceptions of the self discussed in those disciplines." See Rawls, *Justice as Fairness*, 18-24. Rawls recognizes that justice as fairness, as a political conception, does not attempt to answer "the question of what is owed to those who fail to meet this condition [i.e., possession of the two moral powers] either temporarily (from illness or accident) or permanently, all of which covers a variety of cases." See Rawls, *Political Liberalism*, 21.

[436] John Finnis, "On 'Public Reason,'" Petrazycki Lecture, Warsaw University, 6 June 2005.

sands of social consensus—a consensus that affirms a political (and not a metaphysical) conception of the citizen as a free and equal moral person who is member of a fair system of social cooperation over time.[437] The "fact" of our being regarded as free and equal moral persons is a feature of modern liberal democracies, but it is not intended to be normative in a universal or comprehensive sense. Rather, "the conception of the person is worked up from the way citizens are regarded in the public political culture of a democratic society."[438]

Anyone familiar with the political history of America will recognize the difficulty in simply "working up" a liberal conception of the person as free and equal from the public political culture of the nineteenth century.[439] Yet, in response to Sandel's criticism that political liberalism lacks the tools to say why Douglas was wrong in 1858, Rawls tersely responds:

> A further misunderstanding alleges that an argument in public reason could not side with Lincoln against Douglas in their debates of 1858. But why not? Certainly they were debating fundamental political principles about the rights and wrongs of slavery. Since the rejection of slavery is a clear case of securing the constitutional essential of the equal basic liberties, surely Lincoln's view was reasonable (even if not the most reasonable), while Douglas' view was not. Therefore, Lincoln's view is supported by any reasonable comprehensive doctrine . . . What could be a better example to illustrate the force of public reason in political life?[440]

Rawls seems to have missed the brunt of Sandel's criticism; namely, that the very argument he makes to justify the reasonableness of the Lincolnian position is anachronistic when judged by his own theory, which begins with a "fact" of modern, democratic political culture that, by definition, is not normative for antebellum America.

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[437] See Rawls, *Justice as Fairness: A Restatement*, 5.

[438] *Ibid*., 19.

[439] See, for example, Rogers Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven: Yale University Press, 1997).

[440] John Rawls, "The Idea of Public Reason Revisited," in *The Law of Peoples*, 174.

There is, however, an additional caveat to a possible Rawlsian defense of Lincoln inasmuch as Rawls distinguishes the idea of public reason from what he calls the *ideal* of public reason. The ideal of public reason is the realization of the initial idea. It is a state of affairs when "judges, legislators, chief executives, and other government officials, as well as candidates for public office, act from and follow the idea of public reason and explain to other citizens their reasons for supporting fundamental political positions in terms of the political conception of justice they regard as the most reasonable."[441] Additionally, when speaking of the religiously inspired abolitionists (and we might apply the same reasoning to Lincoln and other antislavery public officials[442]), Rawls makes a distinction between an "inclusive view" of public reason (found in *Political Liberalism*) and a "wide view" of public reason (found in *Justice as Fairness: A Restatement* and *The Law of Peoples*). "The difference," Rawls writes, "is that the inclusive view allowed comprehensive doctrines to be introduced only in nonideal circumstances, as illustrated by slavery in the antebellum South and the civil rights movement in the 1960's and later."[443] The "wide view," which is found in Rawls' later works, would allow citizens to articulate reasons based on comprehensive doctrines in order to disclose "where they come from, so to speak, and on what basis they support the public political conception of justice."[444] At the end of the day, however, "the duty of civility requires us in due course to make our case for the legislation and public policies we support in terms of public

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[441] *Ibid*., 135.

[442] Lincoln favored antislavery policies but he was not an abolitionist; neither were his arguments primarily based on religious authority as were the arguments that Rawls is responding to. Nevertheless, I think Lincoln's argument stems from a comprehensive doctrine that is equally as repugnant to public reason as the arguments put forward by Methodists, Quakers, and other religious abolitionists.

[443] Rawls, *Justice as Fairness*, 90, n. 12.

[444] *Ibid*., 90.

reasons, or the political values covered by the political conception of justice . . . ."[445] In other words, reasons based on comprehensive doctrines are justified in the public forum if they are seen as anticipating a time when such reasons will be unnecessary (i.e., when the *ideal* of public reason is a reality) or if they help to explain one's support for the public political conception.

Viewed in this light, Rawls asserts, the arguments put forward by the abolitionists may be viewed conceptually (but not historically) as anticipating a "well-ordered and just society in which the ideal of public reason could eventually be honored . . . . The abolitionists . . . would not have been unreasonable in these conjectured beliefs if the political forces they led were among the necessary historical conditions to establish justice, as does indeed seem plausible in their situation."[446] From the view of public reason, then, one need not condemn the religious or moral public arguments against slavery, because these arguments are part of the necessary historical circumstances leading to the establishment of the ideal of public reason. Rawls emphasizes that his analysis is conceptual, rather than historical, however, because it is quite doubtful whether the historical men putting forward these arguments would agree with Rawls' conceptual characterization. Additionally, given the public political culture of nineteenth century America, it is not altogether clear how the ideal of public reason, in its Rawlsian form, applies at all.[447]

A further distinction may also be made, which I hinted at above, between the religious abolitionists that Rawls is primarily responding to and the antislavery public

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[445] *Ibid*., 90.

[446] Rawls, *Political Liberalism*, 250-251.

[447] By setting up the ideal of public reason (which is understood as emerging from the peculiar facts of modern, democratic societies) as a standard by which to judge a previous historical age with a different public culture, Rawls seems to be making a claim that is unwarranted by his own theory.

officials who articulated arguments primarily based on the authority of nature instead of the authority of a particular religious doctrine.[448] Many of the antislavery public officials were religious people, of course, but natural law arguments for them operated as a "public reason" of sorts—that is, it was assumed that arguments based on natural law could be affirmed in light of the common authority of reason and not the authority of a particular religion. After being censured in the House of Representatives for bringing forth an antislavery petition, John Quincy Adams described his actions as a defense of "the rights of human nature," which he identified with the "inalienable rights of all mankind, as set forth in the Declaration of Independence."[449] Of course, God often was invoked as the author of the rights of human nature, but even this knowledge was thought to be accessible by "natural theology, apart from revelation"—to use Lincoln's phrase.[450]

As Robert George notes, in a different context, the tradition of natural law "proposes what amounts to its own principle of public reason when it asserts that questions of fundamental law and basic matters of justice ought to be decided in accordance with natural law, natural right, natural rights, and/or natural justice."[451] Yet insomuch as political liberalism disallows, for the purposes of deliberation on

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[448] I distinguish here between the terms "abolitionist" and "antislavery." Many of the jurists were antislavery in the sense that they favored construing legal rules, if they believed such legal rules to be ambiguous, *in favorem libertatis*. They did not, however, intend to effect total and immediate abolition in the way favored by religious abolitionists such as William Lloyd Garrison, John Brown, et al.

[449] Quoted in Josiah Quincy, *Memoir of the Life of John Quincy Adams* (Boston: Phillips, Sampson and Company, 1859), 260.

[450] Lincoln, "Speech at Hartford, Connecticut" (March 5, 1860) in Basler, *Collected Works*, Vol. 4: 9.

[451] Robert P. George, "Public Reason and Political Conflict: Abortion and Homosexuality," *The Yale Law Journal*, Vol. 106, No. 8, Symposium: Group Conflict and the Constitution: Race, Sexuality and Religion (June, 1997), pp. 2475. Rawls recognizes the possibility of setting up a well-ordered society that is effectively regulated by a "natural rights doctrine" that all citizens may reasonably accept. This, however, remains distinct from "justice as fairness" and it certainly seems to be distinct from a natural law/right/rights/justice doctrine that assumes the primacy of the good over the right. In substance, then, such a natural rights doctrine, as a political conception, remains a close cousin of justice as fairness. See John Rawls, *Justice as Fairness*, 9.

fundamental questions of constitutional essentials and basic rights, arguments falling outside of a "freestanding" political conception of justice, natural law arguments, along with other comprehensive philosophical, moral, or religious arguments, are disbarred from public reason.[452] This additionally calls into question Rawls' insistence that Lincoln, within the context of political liberalism, was "more reasonable" than Douglas in 1858, for arguably it was Douglas who was simply "working up" a conception of the person from the public political culture of his day.[453]

When considering public reason in the American polity, Rawls also suggests that the paradigmatic example of public reason comes by way of Supreme Court opinions, for public reason applies "in a special way to the judiciary and above all to a supreme court in a constitutional democracy with judicial review." As Rawls explains,

> This is because the justices have to explain and justify their decisions as based on their understanding of the constitution and relevant statutes and precedents. Since acts of the legislative and executive need not be justified in this way, the court's special role makes it the exemplar of public reason.[454]

Rawls additionally articulates this test for whether a particular reason would be permissible in the public forum: ". . . we might ask: how would our argument strike us as presented in the form of a supreme court opinion? Reasonable? Outrageous?"[455] It therefore is quite appropriate to judge Rawls' theory of public reason, as he invites us to, by asking, within the context of slavery, what types of arguments public actors in the

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[452] Rawls, *Political Liberalism*, 10. Rawls writes that "Political liberalism . . . aims for a political conception of justice as a freestanding view. It offers no specific metaphysical or epistemological doctrine beyond what is implied by the political conception itself."

[453] See, for instance, Mark Graber, *Dred Scott and the Politics of Constitutional Evil* (Cambridge University Press, 2006). Part of Graber's argument in is that Douglas may have understood the antebellum constitutional order better than Lincoln.

[454] Rawls, *Political Liberalism*, 216.

[455] *Ibid*., 254.

nineteenth century might have offered when reasoning about such fundamental constitutional questions. Given Rawls's defense of Lincoln in 1858—and Rawls's insistence that the Supreme Court is the exemplar of public reason—it also is relevant to consider in this context the *Dred Scott* case, which provided the immediate backdrop for Lincoln's senatorial debates with Stephen Douglas. Moreover, as I argued in chapter 3, John McLean's dissenting opinion in *Dred Scott* bears the closest affinity to Lincoln's political philosophy, and, between the two options of "reasonable" or "outrageous," offered as the possible judgments of public reason, I think Rawls would have to concede that McLean's reasons for opposing the majority opinion in this case were particularly outrageous. In the next section, then, I turn to *Dred Scott* and to some of the public arguments made against that decision.

THE MORAL AND CONSTITUTIONAL WRONG OF *DRED SCOTT*

To briefly summarize, Chief Justice Taney argued that the Missouri Compromise of 1820 was an unconstitutional congressional action, because it denied substantive property rights (i.e., the right to own and traffic in slaves) guaranteed to American citizens by the due process clause of the Constitution's Fifth Amendment. Additionally, Taney argued that the Constitution prohibited anyone descended from an African slave from *ever* claiming national citizenship under the laws of the United States. The Chief Justice's argument began with a description of the prevailing animus toward members of that "unfortunate race" during the colonial era, and, in perhaps the most cited part of his opinion, he asserted that

> They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.[456]

Considering those aspects of the decision touching on slavery, the Missouri Compromise, and American citizenship, which were informed by Taney's argument regarding the original intent of the Framers, nearly all contemporary legal scholars agree with Alexander Bickel that the *Dred Scott* decision "was a ghastly error."[457] As Paul Finkelman notes, the case now "is at the center of controversies that are almost entirely one-sided. Scholars debate *why* the decision was wrong, not if it was wrong."[458]

Nothing like the contemporary academic consensus existed when the decision was rendered, however. The debate contemporaneous with *Dred Scott* was concerned first with *whether* the decision was wrong and then only secondarily *why*. As Edward Corwin notes, moreover, the position assumed by the Free Soil and Republican critics of the decision,

> which was represented for the nonce in Justice McLean's dissenting opinion, was that there was a difference between slave property and other kinds of property which arises from the alleged fact that slavery was contrary to natural law, and that consequently, while the Constitution

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[456] *Dred Scott* at 407 (Taney, J.).

[457] Alexander Bickel, *The Supreme Court and the Idea of Progress* (New Haven: Yale University Press, 1978), 41.

[458] Paul Finkelman, "*Scott v. Sandford*: The Court's Most Dredful Case and How it Changed History," *Chicago-Kent Law Review*, Vol. 82 (2007), 3. One major exception to the scholarly consensus is Mark Graber's *Dred Scott and the Problem of Constitutional Evil*.

> recognized property in slaves within the States where slavery was permitted, it did not recognize it within the territories.[459]

Though Corwin seemed to think McLean's arguments were "erroneous and beside the point," he did note rightly that McLean's dissent was not based primarily on an alternative reading of Taney's history but instead rested on a consideration of the nature of the thing being claimed as property. While McLean did not dispute Taney's assertion that the Fifth Amendment affords substantive protection for property in the territories,[460] and while he acknowledged that the "Government was not made especially for the colored race,"[461] McLean did dispute whether a human being constituted a legitimate species of property and whether such a being could be claimed as property outside of some expressed provision of the positive law.[462] Absent some expressed provision of the positive law, McLean looked to abstract moral principles and he asserted, "All slavery has its origin in power and is against right."[463]

Fellow dissenter Benjamin Curtis had argued that Congress's authority in the territories extended to any property whatsoever, including slave property. McLean, however, did not agree that all territorial property was constitutionally insecure. Rather, McLean thought that property *in men* was left insecure based, in part, on the nature of the property in question, and he therefore thought, like Lincoln, that it mattered immensely

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[459] Edward S. Corwin, "Dred Scott," in *The Doctrine of Judicial Review* (Princeton: Princeton University Press, 1914), 145.

[460] This supplies the ground for McLean's fellow dissenter Benjamin Curtis, who disputed Taney's conclusion by treating slave property the same as any other property, which may be regulated or prohibited from the territories by the federal government.

[461] *Dred Scott* at 537 (McLean, J. dissenting).

[462] Following a familiar formula of nineteenth century natural law reasoning, McLean held that a judge *qua* judge did not have authority of overturn a legislative decree based on natural law. Nevertheless, where the law was ambiguous or unpronounced, natural law could guide the reasoning of the judge. Therefore, where the positive law does not sanction a right to hold property in man, the law is construed in *favorem libertatis*. This rule of construction does not apply to horse or hog property, but only to property in man (based on the nature of the thing in question). See *Dred Scott* at 549 (McLean, J. dissenting).

[463] *Dred Scott* at 537 (McLean, J. dissenting).

"whether a negro is *not* or *is* a man." McLean's conclusion, moreover, rested on a consideration of the nature of man as such and not, consistent with political liberalism, on an interpretation of how the public political culture regarded man *qua* citizen of a democratic society. As evidence of the humanity of the slave, McLean then asserted that "He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence."[464]

This type of legal reasoning in American jurisprudence—reasoning that engages rather than shuns moral and philosophical questions concerning the nature of man—was not peculiar to McLean. There is a long pedigree of antislavery arguments affirming precisely what McLean affirmed, and some of these arguments are discussed in greater detail in previous chapters. It will be recalled that James Wilson, arguably the leading American legal philosopher at the time of the founding, wrote in a judicial opinion in 1794 that "man, fearfully and wonderfully made, is the workmanship of his all perfect Creator" and that arbitrary power degrades "man from the prime rank, which he ought to hold in human affairs."[465] Wilson argued that this doctrine, based on the law of nature, provided the foundation for American constitutionalism, and elsewhere he asserted that arbitrary power in the form of mastery was "repugnant to the principles of natural law."[466] Wilson also understood the American Constitution in antislavery terms, having declared during the Pennsylvania Ratifying Convention that the various clauses

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[464] *Ibid*., 549 (McLean, J. dissenting).

[465] *Chisolm v. Georgia* (1794) 2 U.S. 455 and 446 (Wilson, J.)

[466] Bird Wilson, ed., *The Works of the Hounorable James Wilson* (Philadelphia: Lorenzo Press, 1804), 488.

implicating human bondage in the newly proposed Constitution laid "the foundation for banishing slavery out of this country."[467]

In a slavery-related case nearly thirty years later, Joseph Story looked for guidance to "the eternal law of nature," which found its bearings from "the general principles of right and justice."[468] While serving as counsel for Africans captured in the slave trade, John Quincy Adams similarly argued before the Supreme Court that the peculiar circumstances of the case caused it to fall under the jurisdiction of no law other than "the law of nature and Nature's God on which our fathers placed our national existence . . . That law," Adams urged, "I trust will be the law on which the case will be decided by this Court."[469] Lincoln, as well, appealed to natural law principles before declaring that Douglas's doctrine of popular sovereignty with respect to slavery "shows that the judge has no very vivid impression that the negro is a human; and consequently has no idea that there can be any moral question in legislating about him."[470]

Antislavery natural law theorizing in the 1850s thus did not emerge *ex nihilo*, but by the time Lincoln took up the struggle against slavery's extension in the federal territories, the movement had splintered over disagreements concerning the relationship of slavery to the Constitution, with the more radical abolitionists denouncing America's fundamental law and eschewing political participation as an avenue to affect their goals of immediate emancipation. On the other side of the antislavery spectrum, activists such as Lysander Spooner and William Goodell began to venture a natural law constitutional

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[467] James Wilson in *The Founder's Constitution*, Volume 3, Article 1, Section 9, Clause 1, Document 6. http://press-pubs.uchicago.edu/founders/documents/a1_9_1s6.html (accessed 05 November 2008).

[468] *La Juene Eugenie*, 26 Fed. Cases 845 (Story, J.).

[469] John Quincy Adams, *Argument of John Quincy Adams before the Supreme Court of the United States,, in the case of the United States, appellants, vs. Cincque . . .* (New York, S.W. Benedict, 1841), 9.

[470] Lincoln, "Speech at Peoria, Illinois" (October 16, 1854) in Basler, *Collected Works*, 2:281.

theory more thoroughly antislavery than anything ever offered by more moderate antislavery constitutionalists such as Adams, McLean, and Lincoln. Because written laws admit of multiple interpretations, Spooner wrote, a proper interpretation "can be only by the aid of that perception of natural law, or natural justice, which men naturally possess."[471] In construing the laws, moreover, the private intentions of framers were irrelevant. Only the public meaning of the words interpreted in light of the principles of natural law—a "thing certain in itself [and] capable of being learned"—could legitimately be considered in the process of constitutional interpretation. "Apply this rule to the interpretation of the Federal Constitution," William Goodell concluded, "and not a single syllable can be construed in favor of slavery."[472]

These more aggressive antislavery constitutional theories arising in the mid-nineteenth century led to what William Wiecek calls the "untenable thesis that slavery had usurped its preferred constitutional status."[473] Rather than conceding that slavery was limited to the municipal laws of the various states, the more radical antislavery constitutionalists began arguing that slavery was constitutionally illegitimate everywhere in the Union (and in fact had been since the document's ratification). As a unique heir to the antislavery constitutional tradition, moreover, Frederick Douglass made use of both the moderate and radical formulations in his own public arguments against slavery. Echoing the argument made by James Wilson, Douglass asserted that the primary wrong of slavery was identical with the primary wrong of arbitrary power, whether "vested in

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[471] Lysander Spooner, *The Unconstitutionality of Slavery* (Boston: 1860), 138.

[472] William Goodell, *Our National Charter, For the Millions* (New York, 1858), 8.

[473] William Wiecek, "Abolitionist Constitutional Theory," in Leonard W. Levy and Kenneth L. Karst, eds., *Encyclopedia of the American Constitution*, 2nd Ed. (New York: Macmillan Reference, 2000), 1:3.

the civil ruler" or in "a slaveholder on a plantation."[474] The wrong of slavery, according to Douglass, then, did not consist primarily in its violence, for "you may surround the slave with luxuries, place him in a genial climate, and under a smiling and cloudless sky, and these shall only enhance his torment and deepen his anguish." Rather, it was the exercise—even if benign—by one man of "absolute power over the body and soul of his brother man" that constituted the particular cruelty of slavery, because such an exercise of arbitrary power degraded the "moral nature" of both master and slave.[475]

And yet even more so than Wilson, Douglass interpreted the Constitution in antislavery terms. The Constitution, according to Douglass, was morally justified as supreme law because it was, in its essence, opposed to the exercise of arbitrary power. Against Taney's contention that the right to own and traffic in slaves was "clearly and expressly affirmed" in the Constitution, Douglass argued that "if in its origin slavery had any relation to the government, it was only as the scaffolding to the magnificent structure, to be removed as soon as the building was completed,"[476] and that slavery, if it were allowed a perpetual existence, would poison, corrupt, and pervert "the institutions of the country," marking out "the white man's liberty . . . for the same grave with the black man's."[477] The moral and constitutional wrongs of slavery thus were identified together as one and the same.

The *Dred Scott* decision rested on the disparate conclusion that the Constitution explicitly affirmed the right to own slaves, and Douglass, as a former Garrisonian

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[474] Blassingame, ed., *The Frederick Douglass Papers*, 3:8.

[475] *Ibid*., 3:11.

[476] Douglas, Frederick, "Should the Negro Enlist in the Union Army?" In Foner, Philip S., ed., *Frederick Douglass on Slavery and the Civil War: Selections from his Speeches and Writings* (Mineola, NY: Dover Publications, 2003), 50.

[477] Blassingame, ed., *The Frederick Douglass Papers*, 3:169.

abolitionist, had to contend with the position held both by Chief Justice Taney and by his former mentor William Garrison that the Constitution itself was a pro-slavery document. In his 1855 autobiography, Douglass described his rejection of this doctrine: "About four year ago," Douglass wrote,

> upon a reconsideration of the whole subject, I became convinced that . . . the constitution of the United States not only contained no guarantees in favor of slavery, but, on the contrary, it is, in its letter and spirit, an anti-slavery instrument, demanding the abolition of slavery as a condition of its own existence, as the supreme law of the land.[478]

Douglass went on to write that his new antislavery constitutional arguments were based on a considered judgment concerning "not only the just and proper rules of legal interpretation, but the origin, design, nature, rights, powers, and duties of civil government, and also the relations which human beings sustain to it."[479]

Douglass's arguments on "the whole subject" cannot, however, be understood apart from his consideration of the nature of the wrong in question. The slave, Douglass repeatedly claimed, was "a moral and intellectual being,"[480] bearing "the image of God . . . [and] possessing a soul, eternal and indestructible,"[481] and slavery, as a violation of the natural moral order, constituted a peculiar "crime against God and man."[482] Douglass's arguments also presupposed a connection between the moral order and divine providence, and, like Lincoln, Douglass interpreted historical events in terms of a providential political theology. The *Dred Scott* decision, in this context, was described by Douglass as "an open rebellion against God's government" and "an attempt to undo what God [has]

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[478] Frederick Douglass, *My Bondage and My Freedom* (Mineola, NY: Dover Publications, Inc., 1969), 396. For an article representative of Douglass's early views, see Frederick Douglass, "The Constitution and Slavery," *The North Star* (16 March 1849).

[479] *Ibid*., 398.

[480] *Ibid*., 431.

[481] *Ibid*., 431.

[482] *Ibid*., 445.

done, to blot out the broad distinction instituted by the *Allwise* between men and things, to change the image and superscription of the everliving God into a speechless piece of merchandise."[483]

Taney's opinion, Douglass declared, was both empirically false to the historical record and normatively false to what the law, when properly interpreted, required—"a most scandalous and devilish perversion of the Constitution, and a brazen misstatement of the facts of history."[484] Even still, the wrong of constitutionally extending slavery to the federal territories was not merely that it relied on bad history or bad constitutional law. Rather, the true wrong of expanding the reach of slavery throughout the territories consisted in its degradation of moral nature through the violation of natural moral rights and natural moral duties. Indeed, the constitutional and moral wrongs were the same: Slavery, Douglass made clear, was synonymous with despotism, and, concomitantly, a respect for natural rights and duties was essential to free government. Summarizing this connection between private and public despotism, Peter Myers writes that the regime of slavery, in Douglass's thought, "was an antigovernment, a system of brutality impelled by its nature to do violence to the dignifying human qualities of all those within its domain and to the cause of civil government everywhere in its vicinity."[485]

After surveying the perilous state of the union in 1857, Douglass argued that because of the encroachments of the slave power—most recently in the edict of Taney—

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[483] Douglass, "The Dred Scott Decision," 168. See Peter C. Meyers, *Frederick Douglass: Race and the Rebirth of American Liberalism* (Lawrence: University Press of Kansas, 2008). Meyers notes that Douglass's "core conviction about the universe's moral design does seem to have originated in a faith in divine Providence, and as [historian David] Blight has carefully documented, his arguments throughout the 1850s were suffused with biblical language, contributing significantly to various traditions in American political theology" (49). See David Blight, *Frederick Douglass's Civil War: Keeping Faith in Jubilee* (Baton Rouge: Louisiana State University Press, 1989).

[484] Douglass, "The Dred Scott Decision," 179.

[485] Myers, *Frederick Douglass*, 45.

"The ballot box is desecrated, God's law is set at naught, armed legislators stalk the halls of Congress, freedom of speech is beaten down in the Senate."[486] This was not a series of desultory thoughts but a description of the interconnectedness of morality and free government. Self-rule, symbolically represented by the ballot-box, required a certain assent to the law of God revealed through nature, and recognition of the authority of the natural law, in turn, was necessary for the establishment of the rule of law (identified conceptually as the rule of reason instead of force).[487] Yet reason did not reign—legislators armed themselves and free speech was stifled—and the genealogy of reason's demise was traced back to the advancements of slavery upon the country.

Within this context, it is difficult to imagine removing the entire framework within which Douglass made his public case against *Dred Scott*, turning instead to the political culture of the 1850's and the reasons that were to be found in its overlapping consensus. Such a move would render impotent nearly all of the arguments that Douglass marshaled against the moral and constitutional wrongs of that infamous decision. In this, I suppose that Rawls would characterize the entire nineteenth century as non-ideal and so would reluctantly admit arguments like Douglass's under such non-ideal circumstances. But Rawls seems to neglect the other side of that coin insomuch as what made the nineteenth century non-ideal, in part, were the numerous illiberal notions of citizenship and moral personality at work in the public political culture. These illiberal notions are

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[486] Douglass, "The Dred Scott Decision," 169.

[487] Douglass argued that the right to liberty was proclaimed by the "voices of nature, of conscience, of reason, and of revelation." See Douglass, "The Dred Scott Decision," 168. Nevertheless, he maintained that nature was epistemologically prior to biblical revelation, proclaiming that "*Should* the doctors of divinity ever convince me that the Bible sanctions American slavery . . . then will I give the Bible to the flames, and no more worship God in the name of Christ." See Frederick Douglass, "Lecture on Slavery No. 7," in Philip S. Foner, ed., *The Life and Writings of Frederick Douglass* (New York: International Publishers, 1975), 5: 174.

unnecessary to catalogue here: The majority opinion in *Dred Scott* serves as a case in point. The question to be asked, then, is how will Rawls, in 1858, decide between competing notions of citizenship and competing ideas concerning the nature of man without engaging the question of which, if either, notion is *true*? How will he contend with Lincoln's insistence that the "real issue" with the democratic policy "in the shape it takes in the *Dred Scott* decision . . . [is that it] carefully excludes that there is anything wrong in [slavery]"?[488]

REVISITING RAWLS'S THEORY

When Rawls authored *A Theory of Justice* in 1971, he would have been able to render a coherent account of why slavery in 1858 was wrong *and* why the reasons given by Abraham Lincoln in opposition to the *Dred Scott* decision were not fully reasonable.[489] Rawls' liberalism relied on a Kantian conception of the person such that it was morally imperative to treat other persons as ends in themselves (hence, the private despotism of one man over another would be wrong insomuch as it treats persons as mere means). Additionally, he denied the "relation between the right and the good proposed by teleological doctrines" and insisted that the right was prior to the good. Hence, the natural law arguments made by Lincoln and others against slavery were not good arguments

[488] Lincoln, "Speech at Alton" (October 15, 1858) in *Lincoln-Douglas Debates*, 390.

[489] By coherent, I mean only that the two positions are logically consistent. As I have tried to argue, I do not think Rawls can consistently hold to his political conception of the person (while excluding arguments in the public forum that are not based on this political conception) *and* offer a normative critique of a different political conception from a different time without appealing to some suprapolitical conception of the person. In other words, Rawls must appeal to some argument that is not part of a given political conception in order to offer a critique of that political conception.

insomuch as they distorted this priority.[490] In *Political Liberalism*, however, Rawls abandons the Kantian conception of the person and instead "works up" a *political* (instead of metaphysical) conception from notions of citizenship implicit in modern democratic culture.

By eschewing a metaphysical conception of the person, Rawls removes the only basis from which to scrutinize a given polity's *political* conception (whatever it happens to be). To revisit the question posed by Sandel regarding Rawls' assertion that Stephen Douglas' position was unreasonable in 1858: "The question is whether liberalism conceived as a political conception of justice can make this claim consistent with its own strictures against appeals to comprehensive moral doctrines."[491] I have suggested that it cannot. Nevertheless, the problem Rawls is responding to in *Political Liberalism* (i.e., the potential for violence that accompanies the existence of incommensurable comprehensive doctrines in a pluralistic society) is a real problem. The theory of public reason constitutes Rawls's attempt to respond to this problem by creating a public space that relies only on the "shared content" through which several comprehensive views coincide.[492] This, too, is a sensible response. But Rawls disavows that his theory of public reason is a *modus vivendi* or a mere way of living peaceably. Instead, he maintains that the political values that are part of the overlapping consensus are affirmed by individuals

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[490] See n. 3, pg. 560, *A Theory of Justice*. See also John Rawls, "The Priority of Right and Ideas of the Good," *Philosophy and Public Affairs* (Fall 1998): 251-276. In *Justice as Fairness*, Rawls argues that "the right and the good are complementary; any conception of justice, including a political conception, needs both, and the priority of right does not deny this" (140). Nevertheless, ". . . the general meaning of the priority of right is that admissible ideas of the good must fit within its framework as a political conception" (141). In other words, the political conception draws a limit around what ideas of the good are admissible. I have argued that Lincoln's opposition to the *Dred Scott* case would not be admissible under this theory when applied to nineteenth century political culture.

[491] Sandel, "Political Liberalism," 1780.

[492] See Rawls, *Justice as Fairness*, 194.

for *moral* and not merely for *political* reasons.[493] It is a moral agreement peculiar to modern democratic societies to bracket certain moral doctrines from public life.[494] As Sandel points out, however, "Where grave moral questions are concerned, whether it is reasonable to bracket moral and religious controversies for the sake of political agreement partly depends on which of the contending moral and religious doctrines is true."[495]

Rawls's "overlapping consensus"—and the public reason it engenders—is not helpful for analyzing the arguments put forward by men such as Lincoln, who were dealing with serious issues about the nature of man and what is owed to him by virtue of his human status as well as prudential questions about how to live together with men with whom one has serious moral disagreements and when, if ever, a resort to violence in defense of the good or the right is justified. One prominent antislavery congressman, responding to the possibility of a tax imposed on Northerners for the execution of the Fugitive Slave Law of 1850, proclaimed in the House of Representatives that

> . . . when it comes to that, I, for one, shall be prepared for the *dernier ressort*,--an appeal to the God of battles. I am a man of peace, but am no non-resistant; and I would sooner have the ashes of my hearth slaked in my own blood and the blood of my children than submit to such degradation.[496]

It is scarcely possible to imagine a similar sentiment being proclaimed in the national legislature today. But how is one to retrospectively evaluate such an assertion without

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[493] Rawls, *Political Liberalism*, 173-212.

[494] As Robert George notes, public reason thus bears the burden of showing why ". . . people are obligated morally, in circumstances in which they are not obliged as a matter of political prudence [i.e., in circumstances requiring a *modus vivendi*], to refrain from acting on principles that they reasonably believe to be true and that are not ruled out as reasons for political action by their reasonable comprehensive doctrines of justice and political morality." See George, "Public Reason and Political Conflict," 2475.

[495] Sandel, "Political Liberalism," 1776.

[496] Joshua Giddings, "Denunciation of Slavery" (June 23, 1852) in *Congressional Globe*, House of Representatives, 32nd Congress, 1st Session, pp. 738-741.

asking if it is reasonable to value honor or justice more than peace or whether, and for what reasons, one should be prepared to offer "resistance in defense of natural right"?[497] Indeed, how is one even to begin such an evaluation without appealing to some conception of the honorable, the just, and the right that transcends any mere *political* conception? The liberalism of John Rawls does not ask such questions. When it is not the subject of consensus, it quietly resigns itself to the sidelines, refusing to fight for the principles it affirms. It certainly would not have been able to fight—rhetorically or otherwise—for freedom in an age of slavery.

[497] *Ibid*.

Chapter 7: Antislavery Constitutionalism and the Scourge of Modern Slavery

In our own day, the constitutional and political landscape is materially altered from that of the nineteenth-century. We have gone to great lengths to right the wrongs of our slaveholding past, while still wrestling with the remnants and incidents of that peculiar institution. But how did we get from there to here? And was there anything inevitable about the course of American history and the cause of emancipation? The development of American antislavery constitutionalism suggests that the eventual triumph of freedom over slavery was (at least in part) contingent on the human participants who contested constitutional meaning and engaged in constitutional politics. The antislavery constitutional theories espoused were, moreover, bound up with the idea of a higher law which undergirded the law of the state and against which the law of the state might be judged. In the imagination of antislavery constitutionalists, the Declaration of Independence thus attained a revered status for its assertion that the foundation of government was the equality of men under the laws of nature and nature's God.

Yet still, while employing a natural law idiom to express the disparity between law and morality, antislavery jurists often sided *against* morality. In no instance was this more apparent than in the application of the Constitution's fugitive slave clause. Indeed, as Robert Cover notes, the crisis of conscience faced by antislavery judges in fugitive slave cases finds a particularly apt analogy in Melville's *Billy Budd*, where the protagonist is a man innocent of wrongdoing in some fundamental sense whom, within the technicalities of the law, is nevertheless charged with violating a legislative act

against mutiny. In a dramatic scene, the Captain of the ship articulates the fundamental tension between law as it is and law as it ought to be:

> How can we adjudge to summary and shameful death a fellow creature innocent before God, and whom we feel to be so?—Does that state it aright? You sign sad assent. Well, I too feel that, the full force of that. It is Nature. But do these buttons that we wear attest that our allegiance is to Nature? No, to the King.[498]

Like the reluctant Captain who dutifully executed the sailor, Cover writes, antislavery judges in antebellum America paraded their "helplessness before the law; lamented harsh results; intimated that in a more perfect world, or at the end of days, a better law would emerge, but almost uniformly, marched to the music, steeled themselves, and hung Billy Budd."[499]

One such judge was Joseph Story, who, despite his own antislavery inclinations, gave the most ardent protections to slave catchers in his decision in *Prigg v. Pennsylvania* (1842). In the mid-1820s, the state of Pennsylvania had passed a statute which "provided that if any person shall, by force and violence, take and carry away, or shall by fraud or false pretence to take, carry away, or seduce any negro or mulatto from any part of the Commonwealth," then such person would be guilty of felony kidnapping.[500] After the Maryland slave catcher Edward Prigg was indicted in Pennsylvania under the statute for forcibly carrying a runaway slave and her children back to Maryland, a suit was initiated by Prigg against the state of Pennsylvania. The Constitutional question hinged on the ambiguously worded fugitive slave clause, which required "a Person held to Service or Labour in one state" to be "delivered up on Claim

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[498] Herman Melville, *Billy Budd*, ed., Hayford and Sealts (Chicago: University of Chicago Press, 1962). Quoted in Robert Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975), 2.

[499] Cover, *Justice Accused*, 6.

[500] *Prigg v. Pennsylvania* (1842) 41 U.S. 539

of the Party to whom such Service or Labour may be due."[501] But whether it was a state or federal function to deliver up the fugitive from labor, and whether state laws protecting colored citizens against kidnapping were unconstitutional preemptions of federal law, the text did make explicit.

Story thus wrote a self-styled pragmatic opinion, declaring that "no uniform rule of interpretation" could be applied that did not attain the ends for which the clause was written. And it was "historically well known," Story insisted, that the fugitive slave clause was written "to secure to the citizens of the slaveholding States the complete right and title of ownership in their slaves as property in every State in the Union which they might escape from the State where they were held in servitude." The judicial interpretation, then, had to reflect that reality, and the Constitution guaranteed a "positive unqualified right on the part of the owner of the slave which no state law or regulation can in any way qualify, regulate, control, or restrain."[502] As the national government was "clothed with the appropriate authority and functions to enforce it," moreover, federal law necessarily superseded any state law to the contrary.

In an odd way, Story paid homage to the antislavery tradition, citing the principle posited in *Somerset*—that the "state of slavery is deemed to be a mere municipal regulation" contrary to natural law—as the *reason* why the fugitive slave clause was historically necessary. For

> . . . if the Constitution had not contained this clause, every non-slaveholding State in the Union would have been at liberty to have declared free all runaway slaves coming within its limits, and to have given them entire immunity and protection against the claims of their

[501] U.S. Constitution Art. IV§2.
[502] *Prigg v. Pennsylvania* (1842) 41 U.S. 539 (Story, J.) at 540

> masters—a course which would have created the most bitter animosities and engendered perpetual strife between the different States.[503]

By this reasoning, a practice contrary to natural law was sanctioned and protected in order to secure the Constitution's very existence. The act by the Pennsylvania legislature, Story argued, was thus "unconstitutional and void" because it purported "to punish as a public offense against the State the very act of seizing and removing a slave by his master which the Constitution of the United States was designed to justify and uphold."[504]

There were, however, other avenues open to Story in his construction of the constitutional principles. John McLean, for instance, dissented from Story's opinion, arguing that there was "no conflict between the law of the state and the law of Congress" written to enforce the fugitive slave clause.[505] The runaway slave, McLean noted, was found "in a State where every man, black or white, is presumed to be free, and this State, to preserve the peace of its citizens, and its soil and jurisdiction from acts of violence, has prohibited the forcible abduction of persons of color." On its face, the state statute did "not include slaves, as every man within the State is presumed to be free, and there is no provision in the act which embraces slaves."[506] If, after an alleged slave had been brought before a federal judicial officer and had been determined to owe service or labor to a citizen of another state under the laws of another state, then the federal remedy would stand. But, McLean insisted, such a remedy was not inconsistent with state protections against arbitrary force.

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[503] *Ibid*., 612.

[504] *Ibid*., 543.

[505] *Ibid*., 669 (McLean, J., dissenting). See Fugitive Slave Act of 1793 in *Proceedings and Debates of the House of Representatives of the United States at the Second Session of the Second Congress, Begun at the City of Philadelphia, November 5, 1792*., "Annals of Congress, 2nd Congress, 2nd Session (November 5, 1792 to March 2, 1793)," pp. 1414-15.

[506] *Ibid*., 671 (McLean, J., dissenting).

McLean particularly took issue with Story's claim that the slave was to be subject, without qualification, to the common law rights of "seizure and recaption." Quoting Blackstone, Story asserted that "when anyone hath deprived another of his property in goods or chattels personal" or wrongfully detained "one's wife, child, or servant," then that person might "lawfully claim and retake them wherever he happens to find them."[507] To this McLean replied,

> Can the master seize his slave and remove him out of the State, in disregard of its laws, as he might his horse which is running at large? This ground is taken in the argument. Is there no difference in principle in these cases?
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> The slave, as a sensible and human being, is subject to the local authority into whatsoever jurisdiction he may go; he is answerable under the laws for his acts, and he may claim their protection; the State may protect him against all the world except the claim of his master. Should anyone commit murder, he may be detained and punished for it by the State in disregard of the master. Being within the jurisdiction of a State, a slave bears a very different relation to it from that of mere property.[508]

In light of McLean's dissent, which tried, at a minimum, to ameliorate the severity of the constitutional remedy provided to masters for the reclamation of fugitive slaves, Story's opinion is notable for its unbending affirmation of the absolute right of a master to seize and recapture his slave and for its assertion that state laws against kidnapping blacks and carrying them across state lines were therefore unconstitutional.

The severity of Story's opinion is puzzling, as well, given his public assertions that the "existence of slavery, under any shape," was "so repugnant to the natural rights of man and the dictates of justice, that it seem[ed] difficult to find for it any adequate justification." [509] Neither is there any reason to suppose Story's estimate of the evils of

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[507] *Ibid*., 613 (Story, J.).
[508] *Ibid*., 668-669 (McLean, J., dissenting).
[509] Story, "Piracy and the Slave Trade" in *Miscellaneous Writings of Joseph Story* (1852), pg. 136.

slavery had changed by the time *Prigg* was decided. To the contrary, according to Story's son, the eminent jurist considered his opinion in *Prigg* to be a great "triumph of freedom."[510] But a triumph of freedom in what sense? The younger Story suggested that his father's opinion promoted the cause of liberty principally in two ways: 1) by resting power over fugitive slaves exclusively in the hands of the "whole people" (i.e., the federal government) rather than a section (i.e., state governments), it allowed national debate such that Congress could "remodel the law and establish . . . a legislation in favor of freedom" and 2) by limiting the *national* constitutional protections (as opposed to municipal or local protections) for slavery only to masters of runaway slaves, it implied that "the authority of a master does not extend to those whom he voluntarily takes with him into a free State where slavery is prohibited."[511]

If this is, in fact, a sufficient explanation of his father's reasoning, then the federal Fugitive Slave Law of 1850 and the *Dred Scott* case of 1857 surely cast doubt on how much of Story's decision in *Prigg* was actually a boon to liberty. Granting exclusive claim to the federal legislature to implement the relevant constitutional provision certainly did not engender national legislation in "favor of freedom," and, as Lincoln maintained, the logic of Roger Taney's subsequent opinion in *Dred Scott* seemed to protect the rights of a master who took his slave *voluntarily* "into a free state where slavery is prohibited."[512] Story's opinion has thus understandably been the subject of much critical commentary. In an attempt to rehabilitate Story's opinion in the midst of modern criticism, Christopher Eisgruber has offered this explanation:

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[510] Joseph Story, *Life and Letters of Joseph Story*, ed., William W. Story (Boston 1851) 2:392.

[511] *Ibid*., 398-400.

[512] See Abraham Lincoln, "First Debate with Stephen Douglas" (21 August 1858) in Roy Basler, ed., *Collected Works of Abraham Lincoln* (New Brunswick, NJ: Rutgers University Press, 1953), 3:24. Lincoln warned of "another Dred Scott decision . . . holding that they cannot exclude [slavery] from a state."

> . . . according to Story, the Constitution aimed to create not merely a free North, or a collection of states partly free and partly slave, but rather a free Union. In order to effectuate this purpose, the Constitution had to accommodate and include both the recognition that slavery was immoral and also the means sufficient to keep the Union together until the federal government could eliminate slavery. As such, the Constitution reflected both a natural law judgment and a pragmatic concession to the exigencies of power and interest. This dual character of the Constitution is itself entirely consistent with, and perhaps even demanded by, natural law. As a result, any sound interpretation of the Constitution must attend both to its ethical purposes and to its practical compromises.[513]

Yet even if we grant Eisgruber's interpretation of Story's judicial reasoning, subsequent political events in the decades preceding the Civil War belied Story's hope that *Prigg* would spur national legislative and judicial activity in favor of freedom. Thus *Prigg* v. *Pennsylvania*—along with the plethora of cases in which antislavery men steeled themselves in order to hang Billy Budd—brings up difficult questions pertinent to our assessment of the antislavery constitutional tradition.

In fact, it seems that none of the antislavery jurists and statesmen was completely immune from the practical necessities of compromise. In his eulogy of John Quincy Adams, for example, the antislavery theologian and preacher Theodore Parker declared of Adams that there was "one sentiment that [ran] through all his life—an intense love of freedom for all men; one idea, the idea that each man has Unalienable Rights."[514] But, even still, Parker reluctantly catalogued the ways in which Adams aided the cause of slavery during his political career:

> It must be confessed that Mr. Adams, while Secretary of State, and again while President, showed no hostility to the institution of slavery. His influence all went the other way. He would repress the freedom of the blacks in the West Indies, lest American slavery should be disturbed and

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[513] Christopher L.M. Eisgruber, "Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism," *The University of Chicago Law Review*, Vol. 55, No. 1 (Winter 1998), pp. 298.

[514] Theodore Parker, *Discourse Occasioned by the Death of John Quincy Adams: Delivered at the Melodron in Boston, March 5, 1848* (Boston: Bela Marsh, 1848), 18-19.

> its fetters broke; he would not acknowledge the independence of Hayti, he would urge Spain to make peace with her descendents for the same reason—'not for those new republics,' but lest the negroes in Cuba and Porto Rico should secure their freedom. He negotiated with England, and she paid the United States more than a million of dollars for the fugitive slaves who took refuge under her flag during the late war. Mr. Adams had no scruples about receiving the money during the administration . . . Nay, he negotiated a treaty with Mexico, which bound her to deliver up fugitive slaves escaping from the United States—a treaty which the Mexican Congress refused to ratify![515]

Concessions to slavery by antislavery men were not, therefore, unique to the Court, due perhaps to the limited role of the judiciary in a constitutional republic and the emphasis in the nineteenth century on a judicial separation of law and morality. In this vein, what is to be made of a man like Adams, who professed his hatred for slavery and nevertheless fought for its protection, in various ways, during his tenure as Secretary of State and President?

Perhaps part of the answer is to be found in the recognition that to leave an imprint on the law, politicians, as much or even more than judges, must take account of political constraints, popular prejudices and fears, and the priority of issues demanding their attention. Exploring the constraints of the political environment in which Adams operated, Michael Hawkins writes therefore not only of the "politics of slavery" but also of the "slavery of politics."[516] Within the convoluted political environment of the day, many antislavery politicians in the nineteenth-century, like many of the Founders of the Republic, "gave the [antislavery] movement their sympathy and formal endorsement but always had other more pressing claims on their sustained attention." As Don Fehrenbacher observes of the generation of 1776, they

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[515] *Ibid*., 32-33.

[516] Michael Daly Hawkins, "John Quincy Adams and the Maritime Slave Trade: The Politics of Slavery and the Slavery of Politics," *Oklahoma City University Law Review*, Vol. 25 (2000), 1-61.

> . . . were inhibited by their desire for continental unity, by a tender concern for the rights of private property, and, in the South, by racial fears that made universal emancipation difficult to visualize. In the end, there was a strong disposition to settle for moral gesture and a reliance on the benevolence of history.[517]

History, of course, was not so benevolent, and the political calculation that a strong national union would lead eventually to a free national union was proved false by the increasing militancy and fervor of the slave interest in the mid nineteenth-century.

This perhaps is why, as Joshua Giddings later recounted, a disillusioned 77 year-old Adams declared to a group of free blacks in 1844: "We know that the day of your redemption must come: The time and manner of its coming we know not; but *whether in peace or in blood*, LET IT COME." When publicly challenged about the implications of his speech on the floor of the House of Representatives, Adams then repeated, emphatically, "though it cost the blood of MILLIONS OF WHITE MEN, LET IT COME. *Let justice be done, though the heavens may fall*."[518] As Adams's father had early on acknowledged, however, adopting the maxim *fiat justitia ruat caelum* could never settle the myriad practical moral and political questions surrounding slavery. "If we should agree with him in this maxim," the elder Adams wrote after it was asserted by the esteemed law professor St. George Tucker,

> . . . the question would still remain, what is justice? Justice to the Negroes would require that they should not be abandoned by their masters and turned loose upon a world in which they have no capacity to procure even a subsistence. What would become of the old? the young? the infirm? Justice to the world, too, would forbid that such numbers should be turned out to live by violence, by theft, or by fraud.[519]

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[517] Don Fehrenbacher, *Slavery, Law, & Politics: The Dred Scott Case in Historical Perspective* (New York: Oxford University Press, 1981), 9.

[518] Joshua Giddings, *History of the Rebellion* (New York: Follett, Foster & Company, 1864), 217-218.

[519] John Adams to Jeremy Belknap (22 October 1795), *Massachusetts Historical Society* <http://www.masshist.org/database/onview_full.cfm?queryID=639> (accessed 29 May 2009).

The problem of slavery, as much as any social problem, required the complete reformation of law and society for its true abolition. The answer to the question of what justice required was thus never unidimensional and the antislavery movement was divided over the appropriate role of politics and the most effective methods of ending the institution of slavery consistent with justice.

As I have argued, moreover, the younger Adams, like his father and much of the antislavery tradition, grounded both his interpretation of the Constitution and his own opposition to slavery in a theory of natural law, and, like Lincoln after him, he viewed the conflict between freedom and slavery as a cosmic struggle implicating moral principles that were not merely parochial or conventional but rooted in the order of nature. In a letter to the abolitionist Arthur Tappan, Adams also foreshadowed Lincoln's own providential interpretation of the Civil War. Professing his own impotence in the struggle against slavery, Adams declared that the "great revolution in the history and condition of man upon the earth" would be "accomplished by the will of his maker, and through means provided by him in his good time." Adams thus resigned himself to acting his "part in promoting it," knowing, like the biblical David with respect to construction of the Temple, that he was not "the chosen instrument to accomplish that great undertaking."[520] That task would be left to Lincoln, who, like Solomon, has been remembered in American folklore above all for his practical wisdom.

As I have tried to demonstrate, however, Lincoln was part of a larger antislavery constitutional tradition with antecedents reaching back to the English common law and to the political and legal theories undergirding American constitutionalism. Certainly, the

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[520] John Quincy Adams to Arthur Tappan (15 July 1845), *Gilder Lehrman Center for the Study of Slavery, Resistance & Abolition* <http://www.yale.edu/glc/archive/1051.htm> (accessed 29 May 2009).

legacy of this tradition is not to be found in a list of easy or obvious solutions to the complex legal and moral questions surrounding constitutional adjudication at the federal level. The number of slavery-related cases on the docket of the Supreme Court in the nineteenth century was sparse, and the record, even with sympathetic jurists, was unfavorable to freedom. In its official opinions in *The Antelope* and *Prigg*, the Court conceded that slavery was immoral but nonetheless vindicated the rights of slave masters. In *Dred Scott*, the Court was much more agnostic about the morality of slavery, asserting only that it was the original understanding of the framers that blacks had "no rights which the white man was bound to respect."[521] The case of *The Amistad* seemed to provide a momentary victory, but the Court was quick to affirm that their decision would have been different had the laws of Spain been different. It is not surprising, then, that many of the abolitionists who assumed that the Constitution was precisely what the Court said it was soon began to question the very legitimacy of the American regime.

Constitutionalism is not the province of judges only, however, and the wider antislavery tradition involved a diverse group of public actors—politicians, statesmen, orators—who emerged as defenders and preservers of an important aspect of our constitutional heritage. In assessing the legacy of the tradition of antislavery constitutionalism, we might therefore consider how American constitutional development might have been different in the absence of such a tradition. Presuming there was never a law thought to be higher than the law of the state, what would have motivated reformers and from what resources would they have drawn their arguments? The answers to these questions are necessarily speculative, but I think it is uncontroversial to assume America

[521] *Dred Scott* at 407 (Taney, J.).

today would be a different place. Certainly America's second founding, involving "a new birth of freedom," as it were, would not have taken the same shape or form. For the more radical Reconstruction Republicans—Charles Sumner, William Seward, Salmon Chase, Joshua Giddings, Benjamin Wade, et al—were very much indebted to the American antislavery constitutional tradition and its emphasis on "a higher law than the Constitution."[522]

The plausibility and legitimacy of this kind of constitutionalism has been called into question in the modern era, however, and one of the themes of this dissertation has been the normative challenge that emerges once we have dispensed with "the laws of nature and nature's God." With rare candor, Robert Lowry Clinton summarizes the question at the heart of this challenge:

> Ultimately, it comes to this: either there is a God who creates and orders the human legal cosmos by the infusion of a natural law, which is the imprint of eternal law in the human psyche and which thus cannot but be reflected in the common historical practices of humanly devised legal institutions, or there is not and we are abandoned to our own devices.[523]

Clinton is himself sympathetic to the Thomist tradition of natural law theorizing, but his description of the conflict applies equally to various other natural law traditions and to the colloquial forms these traditions assumed in the American experience. Moreover, the dichotomy drawn by Clinton between natural law constitutionalism, on the one hand, and modern agnostic and antifoundationalist constitutionalism, on the other, is relevant when

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[522] William H. Seward quoted in Hans L. Trefousse, *The Radical Republicans* (New York: Knopf, 1968), 6. See generally Jacobus ten Broek, *The Antislavery Origins of the Fourteenth Amendment* (Berkeley: University of California Press, 1951); Herman Belz, *A New Birth of Freedom: The Republican Party and Freedmen's Rights, 1861-1866*, 2nd Edition (New York: Fordham University Press, 2000).

[523] Robert Lowry Clinton, *God and Man in the Law: The Foundations of Anglo-American Constitutionalism* (Lawrence: University Press of Kansas, 1999), 190.

considering and assessing the nineteenth-century debate over the place of slavery in the American republic.

As one twentieth-century Cambridge professor noted, it is "useless to compare the moral ideas of one age with those of another" if we do not first assume a transhistorical standard of morality relative to a fixed human nature; for without such an assumption, "progress and decadence are alike meaningless words."[524] The abandonment of such a standard by modern scholars has led to the awkward convention of talking passionately about our values while admitting that they have no other basis than our own subjective experience. I suspect that one reason for this development is the Hobbesian assumption that moral subjectivism is more likely to lead to peace than a robust natural law theory. This assumption is perfectly groundless, however, and the history of violence in the twentieth-century lends support to Oliver Wendell Holmes's observation that men are willing to fight and die even for what they regard as arbitrary preferences.[525] Yet even if abandoning moral realism could lead to peace, it would not lead to justice, as justice itself would be a vacuous word.

All of this comes into greater focus when retrospectively evaluating America's struggle with slavery. We live in a time when few in our country would defend the moral propriety of establishing and protecting the legal ownership of some human beings over others. By returning to the debates over slavery just a century and a half ago, we gain a new appreciation for the moral drama that played out and led us to where we are today. Additionally, by returning to the *constitutional* debates over slavery, we gain insights into the ideological contests that have driven the process of constitutional development during

[524] C.S. Lewis, "The Poison of Subjectivism," in *The Seeing Eye*, ed., Walter Hooper (New York: Bellantine Books, 1986), 101.

[525] Oliver Wendell Holmes, "Natural Law," *Harvard Law Review*, Vol. 32, No. 1 (November 1918), 41.

the nation's short history. From a contemporary vantage point, the universally acknowledged moral and constitutional evil of slavery has also been invoked analogously in various contemporary constitutional debates and by all sides of those domestic political skirmishes we call the "culture wars."[526] While it is important for us to carefully consider the merits of such comparisons, we need not look to the current controversies in our own domestic politics to find an analog to slavery. It has been estimated that there are, in fact, some 27 million people enslaved in the world today and many of these slaves reside in or are trafficked through the United States each year.[527]

"The simple truth" Kevin Bales and Ron Soodalter write in *The Slave Next Door*, "is humans keep slaves; we always have."[528] The obvious difference with modern slavery is that it operates without legal sanction and it is proscribed by our fundamental law. The contemporary antislavery movement is thus not preoccupied with constitutional interpretation and adjudication at the federal level. Instead, the movement has turned its attention to American foreign policy, and its broad and ambitious goal is to abolish, through diplomatic means, the relationship of power between master and slave that has existed in some form or another in nearly every culture and society in history. The new

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[526] See Mark Graber, "Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory," 14 *Constitutional Commentary* 271 (1997). See also, for example, Congressman Trent Franks, U.S. House Judiciary Committee, *Hearing on the Legacy of the Slave Trade* (18 December 2007), Serial No. 110-63, pp. 2-5 (comparing abolitionism to pro-life activism); David A. J. Richards, *Identity and the Case for Gay Rights*, pp. 6-38 (comparing abolitionism to gay rights activism).

[527] The estimate comes from Kevin Bales, *Disposable People: New Slavery in the Global Economy* (Berkeley: University of California Press, 2000), 8. Bales defines a slave as "*a person held by violence or the threat of violence for economic exploitation,*" and this definition encompasses forced manual labor and debt bondage as well as sex slavery and other forms of violent economic exploitation (280). For an account of contemporary slavery in the United States, see Kevin Bales and Ron Soodalter, *The Slave Next Door: Human Trafficking and Slavery in America Today* (Berkeley: University of California Press 2009). According to a U.S. Department of State study cited by Bales and Soodalter, the number of persons trafficked in the United States in 2006 was between 14,500-17,500.

[528] Bales and Soodalter, *The Slave Next Door*, 5.

antislavery movement is driven, moreover, by ideological premises quite similar to those driving the movement of nineteenth-century antislavery constitutionalism.

In his study of the political alliances that have emerged in support of human rights legislation such as the *Victims of Trafficking and Violence Protection Act* (2000), Allen Hertzke chronicles how the grass-roots muscle for this movement has come largely from people of faith who are "convinced there are fixed standards of right and wrong" and therefore are "uninfected by the postmodern malaise." Throughout American history, Hertzke notes, "the pietistic tendency to see worldly struggles in cosmic moral terms has infused social movements with energetic fervor," and the political mobilization efforts against modern slavery are no different. The moral certainty of many of the leaders involved with this issue has, moreover, provided an antidote to what Hertzke calls the "fallout from the abandonment of transcendent societal anchors."[529]

The modern antislavery movement, of course, is not a sectarian religious movement. Like the antislavery movement of the nineteenth-century, it encompasses a broad array of political and religious groups that often make for uneasy alliances. "Liberal Jewish groups team up with conservative Pentecostals," Hertzke notes, "the Catholic Church with Tibetan Buddhists, Episcopalians with the Salvation Army, black churches with secular activists, feminists with evangelicals."[530] As the modern antislavery movement has developed, it has additionally reached back into the resources of American history and emphasized America's struggle with the disharmony between normative ideals and political realities. In his introduction to the State Department's

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[529] Allen D. Hertzke, *Freeing God's Children: The Unlikely Alliance for Global Human Rights* (Lanham, MD: Rowman & Littlefield, 2004), 24; 25; 34.

[530] Hertzke, *Freeing God's Children*, 4.

congressionally mandated 2008 *Trafficking in Persons Report*, Ambassador Mark Lagon wrote, for example, that America

> . . . was ripped apart by a bloody civil war which sought to reconcile the words and ideas that birthed the United States and the brutal reality of a society fueled by the blood and sweat of human bondage.
>
> The same lie which the transatlantic slave trade of the eighteenth and nineteenth centuries, namely that some people are less than human, is the very lie that fuels modern-day slavery.[531]

Because slavery is outlawed by the 13th Amendment, there is no longer a conflict between constitutional concessions to slavery and the normative ideals underpinning American constitutionalism generally. There is still, however, an unavoidable conflict between the ideals of human dignity and other strategic and political calculations that play out on the international stage.

Part of the modern antislavery movement's strategic and political calculus involves, moreover, a consideration of the role of constitutional norms in the promotion of international justice. Debate over the scope and source of constitutional rights and duties are of an increasingly international character, and scholars of public law have begun to take notice of the transnational migration of constitutional norms.[532] In this process, some have suggested that a new international order based on the judicialization of rights is emerging in the international arena.[533] As the modern antislavery movement attempts to navigate this convoluted political and legal environment, it will surely come

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[531] U.S. State Department, 2008 *Trafficking in Persons Report*, <http://www.state.gov/documents/organization/105655.pdf> (accessed 01 June 2009)

[532] See Gary Jacobsohn, "The Permeability of Constitutional Borders," *Texas Law Review*, Vol. 18 (2004) and Sujit Choudry, ed., *The Migration of Constitutional Ideas* (Cambridge University Press, 2006).

[533] See Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004) and "Symposium: A New Constitutional Order: Panel 4: Towards Juristocracy: The Origins and Consequences of the New Constitutionalism," *Fordham Law Review*, Vol. 75 (2006), pp. 675-755.

up against business and economic interests as well as difficult calculations of *real politick*, and many of the leaders of the movement will continue to look to the antislavery tradition of an earlier generation for strategic and moral guidance.

The interpretation of American antislavery constitutionalism presented in this dissertation additionally provides certain historical and normative challenges to contemporary students of American politics. While recognizing the injustices committed in America's past, this interpretive paradigm cuts against what Barack Obama has characterized as a "profoundly distorted view of this country—a view that sees white racism as endemic, and that elevates what is wrong with America above all that we know is right with America."[534] Normatively, it also reinforces the continued vitality of what Obama's predecessor, in his address to the United Nations on the lingering problems of modern slavery and human trafficking, characterized as "the moral law that stands above men and nations, which must be defended and enforced by men and nations."[535] If disharmony indeed is a universal constitutional condition, then this interaction between the normative order and the less pristine realm of politics will continue to play out—seldom linearly, often tragically—in the ongoing development of modern constitutionalism.

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[534] Barack Obama, "A More Perfect Union," Speech Delivered at the Constitution Center, Philadelphia, PA (18 March 2008).

[535] George W. Bush, Address to the United Nations General Assembly, New York, NY (23 September 2003).

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Vita

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